Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DARRELL LEE SHAFER,

Petitioner,

vs.

MAGGIE MILLER-STOUT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. THE CHALLENGED DECISION OF THE PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WHICH WAS ENTERED ON MAY 4, 2004, AND WHICH DECISION ERRONEOUSLY AFFIRMED THE EARLIER RULING OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON WHEREIN PETITIONER SHAFER'S PETITION FOR WRIT OF HABEAS CORPUS IN A CRIMINAL CASE, DIRECTLY CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *BRECHT V. ABRAHAMSON*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). **SHOULD THE SUPREME COURT, IN TERMS OF FEDERAL DUE PROCESS AND FUNDAMENTAL FAIRNESS, RESOLVE THIS CONFLICT AND IMPORTANT MATTER OF MAINTAINING FEDERAL PRECEDENT CONCERNING THOSE PRECISE STANDARDS AND GUIDELINES ASSOCIATED WITH A DECISION BY THE COURT AS TO WHETHER TO GRANT OR DENY A FEDERAL WRIT OF HABEAS CORPUS IN A CRIMINAL CASE?**

2. THIS CASE ALSO CONCERNS MATTERS OF EXCEPTIONAL IMPORTANCE SPECIFICALLY INVOLVING THE PUBLIC INTEREST AND WELFARE. IN THIS REGARD, THE CHALLENGED DECISION OF NINTH CIRCUIT IN THIS MATTER DIRECTLY CONTRAVENES ESTABLISHED FEDERAL PRECEDENT, BY ALLOWING AND SANCTIONING (A) THE ADMISSION OF EXPERT TESTIMONY WHICH IS IMPROPER UNDER THE SEMINAL DECISION FIRST ENTERED IN *FRYE V. UNITED STATES*, 293 F. 1013 (D.C. Cir. 123), AND ITS PROGENY; (B) THE DENIAL OF FEDERAL DUE PROCESS IN TERMS OF THE PROHIBITION AGAINST A THIRD PARTY

QUESTIONS PRESENTED – Continued

TESTIFYING AND VOUCHING FOR THE CREDIBILITY AND VERACITY OF THE COMPLAINING WITNESS AND THEREBY INVADING THE PROVINCE OF THE JURY AS ENUNCIATED IN SUCH DEFINITIVE DECISIONS AS IN *SNOWDEN V. SINGLETARY*, 135 F.3d 732 (11th Cir.), *cert. denied*, 525 U.S. 963, 119 S.Ct. 405, 142 L.Ed.2d 329 (1998); AND (C) THE CUMULATIVE EFFECT OF SUCH ERRORS WHICH RESULTED IN THE DENIAL OF THOSE FEDERAL RIGHTS GUARANTEED AN ACCUSED UNDER THE PRINCIPLES OF DUE PROCESS AND FUNDAMENTAL FAIRNESS IN A CRIMINAL PROCEEDING. **SHOULD THE SUPREME COURT ONCE AGAIN RESOLVE THESE ADDITIONAL ERRORS EFFECTING DUE PROCESS AND THE PUBLIC INTEREST WHICH HAVE CREATED BY THE SUBJECT DECISIONS OF THE NINTH CIRCUIT AND DISTRICT COURT AND WHICH CONTRAVENE FEDERAL LAW AS ESTABLISHED AND CONFIRMED BY THIS COURT AND AS OTHERWISE APPLIED CONSISTENTLY BY THE CIRCUIT AND DISTRICT COURTS?**

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
CITATION TO OPINIONS BELOW	1
STATEMENT OF BASIS FOR JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
Overview of Case	5
Statement of Facts and Procedural History	6
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	17
APPENDICES	App. i

TABLE OF AUTHORITIES

Page

CASES

Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) ..... *passim*

Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) 9, 11

Ewing v. Williams, 596 F.2d 391 (9th Cir. 1979) 10, 16

Frye v. United States, 293 F. 1013 (D.C.Cir. 1923) 9, 11

Lambright v. Stewart, 220 F.3d 1022 (9th Cir. 2000) 10, 14, 16

Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) 10, 16

Mancuso v. Olivarez, 292 F.3d 939 (9th Cir. 2002) 12

Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983) 12

Snowden v. Singletary, 135 F.3d 732 (11th Cir.), *cert. denied*, 525 U.S. 963, 119 S.Ct. 405, 142 L.Ed.2d 329 (1998) 8, 10, 13, 14, 15

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) 11

United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973) 11

United States v. Azure, 801 F.2d 336 (8th Cir. 1986) ... 10, 13

United States v. Binder, 769 F.2d 595 (9th Cir. 1985) 10, 14

United States v. Charley, 189 F.3d 1251 (10th Cir. 1999) 9

United States v. Samara, 643 F.2d 701 (10th Cir. 1981) 10, 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Tucker, 716 F.2d 576 (9th Cir. 1983) 10, 16

United States v. Velarde, 214 F.3d 1204 (10th Cir. 2000) 11, 13, 14, 15

United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) 10, 14, 16

STATUTES

28 U.S.C. §1254 ..... 4, 17

28 U.S.C. §2253 4

28 U.S.C. §2254 4

28 U.S.C. §2254(d)(1) 9, 11, 13, 16

RULES

U.S. Supreme Court Rule 10 9

U.S. Supreme Court Rule 10(a) 17

U.S. Supreme Court Rule 10(c) 17

Federal Rules of Appellate Procedure 22(a) 4

Federal Rules of Appellate Procedure 35(a) 4

Federal Rules of Appellate Procedure 40 4

CONSTITUTIONAL PROVISIONS

U.S.Const., amend. 5 ..... 4, 10

U.S.Const., amend. 14 ..... 4, 10

PETITION FOR WRIT OF CERTIORARI

Petitioner, DARRELL LEE SHAFER, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 4, 2004, wherein the Court affirmed the final judgment of the United States District Court, Eastern District of Washington, terminating the subject cause and thereby dismissing the subject petition for writ of habeas corpus on February 7, 2003. [Appendices A-C & M].

CITATION TO OPINIONS BELOW

Federal Court Opinions:

A. The opinion and order of the United States Court of Appeals for the Ninth Circuit affirming the February 7, 2001, judgment of the United States District Court, Eastern District of Washington, is unofficially reported at *Shafer v. Miller-Stout*, No. 03-35254 (9th Cir. May 4, 2004). [Appendix A].

B. The judgment entered by the United States District Court, Eastern District of Washington, wherein the subject petition for writ of habeas corpus was denied is unofficially reported at *Shafer v. Miller-Stout*, No. CS-00-419-CI (E.Wash. February 7, 2003). [Appendix B].

C. The order adopting report and recommendation entered by the United States District Court, Eastern District of Washington, is unofficially reported at *Shafer v. Miller-Stout*, No. CS-00-419-CI (E.Wash. February 7, 2003). [Appendix C].

D. The certificate of appealability issued by the United States District Court, Eastern District of Washington, is unofficially reported at *Shafer v. Miller-Stout*, No. CS-00-419-FVS (E.Wash. March 17, 2003). [Appendix D].

Underlying State Court Opinions:

E. The certificate of finality issued by the Washington State Court of Appeals, Division III, concerning order dismissing personal restraint petition, is unofficially reported in *In the Matter of the Application for Relief from Personal Restraint of Shafer*, No. 18972-4-III (January 18, 2001). [Appendix E].

F. The order entered by the Supreme Court of the State of Washington, denying motion to modify commissioner's ruling and motion to add new grounds for relief, is unofficially reported in *In the Personal Restraint Petition of Shafer*, No. 70139-3 (January 9, 2001). [Appendix F].

G. The ruling denying review entered by the Supreme Court of the State of Washington is unofficially reported in *In the Personal Restraint Petition of Shafer*, No. 70139-3 (October 27, 2000). [Appendix G].

H. The order dismissing personal restraint petition entered by the Washington State Court of Appeals, Division III, is unofficially reported in *In the Matter of the Application for Relief from Personal Restraint of Shafer*, No. 18972-4-III (July 27, 2000). [Appendix H].

I. The mandate issued by the Washington State Court of Appeals, Division III, is unofficially reported in *State v. Shafer*, No. 16072-6-III (February 3, 1999) [Appendix I].

J. The order denying petition for discretionary review entered by the Supreme Court of the State of

Washington is unofficially reported in *State v. Shafer*, No. 67051-0 (January 6, 1999). [Appendix J].

K. The unpublished opinion entered by the Washington State Court of Appeals, Division III, affirming judgment and sentence is unofficially reported in *State v. Shafer*, No. 16072-6-III (June 9, 1998) [Appendix K].

L. The judgment and sentence entered by the Superior Court of Yakima County, State of Washington, is unofficially reported in *State v. Shafer*, No. 95-1-01068-2 (September 13, 1996) [Appendix L].

Federal Opinion Denying Rehearing:

M. The order of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing en banc is unofficially reported at *Shafer v. Miller-Stout*, No. 03-35254 (9th Cir. June 14, 2004). [Appendix M].

STATEMENT OF BASIS FOR JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Ninth Circuit entitled *Shafer v. Miller-Stout*, No. 03-35254 (9th Cir. May 4, 2004) [Appendices A & M], pertaining to the affirmance of the underlying judgment of the United States District Court, Eastern District of Washington [Appendices B-D], concerning the subject habeas corpus relief sought by petitioner with respect to the underlying decisions entered by the courts of the State of Washington [Appendices E-L]. On May 17, 2004, Petitioner timely filed a petition for rehearing en banc with the Court of Appeals. Said petition for rehearing was denied on June 14, 2004. [Appendix M].

The United States Court of Appeals for the Ninth Circuit had jurisdiction over the appeal and the petition for rehearing en banc by virtue of 28 U.S.C. §2253, and Rules 22(a), 35(a) and 40 of the Federal Rules of Appellate Procedure (FRAP). The United States District Court, Eastern District of Washington, also had jurisdiction over this cause under 28 U.S.C. §2254 following the timely filing of a petition for writ of habeas corpus by Petitioner with the District Court on November 17, 2000. This Court now has jurisdiction of this petition for writ of certiorari under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution [Appendix N] provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . .

The Fourteenth Amendment to the United States Constitution [Appendix O] provides, in pertinent part:

> . . . No State shall . . . deprive any person of life, liberty, or property without due process of law;. . . .

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254 [Appendix P] provides, in pertinent part:

> (d) an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be

granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;. . . .

STATEMENT OF THE CASE

Overview of Case:

This is a criminal matter in which Petitioner was charged and convicted in Washington state court of the alleged offenses of child rape and attempted molestation of three girls. Petitioner was sentenced to 360 months imprisonment and is presently in the custody of the Washington State Department of Corrections. After exhausting all state remedies, petitioner sought federal habeas corpus relief. Following the denial of his writ for habeas in United States District Court, Eastern District of Washington, and his subsequent appeal to the United States Court of Appeals for the Ninth Circuit, petitioner is now before this Court seeking issuance of a writ of certiorari. For sake of brevity, as well as for the convenience of this Court, the following abbreviations are used in terms of citation to the underlying record: [ER –] refers to the pertinent page numbers in the excerpts of record originally filed with the Ninth Circuit in this matter; and [App. –] refers to the pertinent appendix attached to this petition for writ of certiorari.

Statement of Facts and Procedural History:

In 1996, Petitioner was convicted by a jury in the Superior Court of Yakima County, Washington, of child rape and molestation of three alleged victims and was sentenced to 360 months imprisonment. [ER 17-23; App. K-L, Q]. At trial, the prosecution had relied upon the testimony of two expert witnesses concerning the credibility of alleged victims. [ER 311-46, 368-423, 531; App. Q]. Dr. Roy Simms, a pediatrician, was one of these witnesses. [ER 26, 28, 311-46, 531; App. K and Q]. He had conducted a physical examination of one of the girls. [ER 26, 28, 311-46; App. K and Q]. While Dr. Simms found no evidence of physical trauma, he was nonetheless permitted to testify that the girl's statements supported a medical diagnosis of sexual abuse. [ER 328, 531; App. Q].

The other expert witness for the State was Robyn Light. [ER 26-27, 368-423, 531; App. K and Q]. Ms. Light had served as an investigator and manager of the victim-witness unit of the Yakima County Prosecutor's Office. [ER 26-27, 368-71; App. K and Q]. Over defense objection including, *inter alia*, the lack of any scientific basis or foundation for her testimony, Ms. Light was nonetheless permitted to testify concerning her opinion that children are incapable of describing events in terms of their sensory perception and detail unless they have actually experienced the events they describe. [ER 26-32, 234-35, 368-423, 531-32; App. K and Q]. Her testimony was similarly challenged by the defense on the basis she never, in fact, interviewed any of the girls; rather, Ms. Light had only reviewed a report of sheriff's detective Edmond West Campbell concerning the girls' alleged statements to him and believed those alleged statements contained sensory

details consistent with sexual abuse. [ER 26-32, 234-35, 368-423, 531-32; App. K and Q].

Finally, over defense objection, the prosecution was allowed to call Detective Campbell to testify concerning the victims' supposed statements to him. [ER 27, 407-08, 424-71, 444; App. K and Q]. This was notwithstanding the fact, the State had presented Ms. Light's testimony, and also the testimonies of the complaining witnesses and others to who the girls had alleged confided about their abuse. [ER 27, 68-91, 93-309, 348-67, 407-08, 444; App. K and Q].

Petitioner appealed his conviction to the Washington State Court of Appeals, Division III. [App. K and Q]. The state appellate court concluded that Ms. Light's testimony was admissible insofar as, in its view, she had neither commented directly upon Petitioner's guilt nor the veracity of the complaining witnesses so as to usurp the province of the jury in determining witness credibility. [ER 30-32; App. K and Q]. The testimony of Dr. Simms was a different matter. [ER 32; App. K and Q]. The appellate court held that his testimony on abuse was improper since it was based merely on the statements of the girl he examined. [ER 32; App. K and Q]. Nevertheless, this error was deemed harmless in light of other evidence. [ER 24-41; App. K and Q].

After exhausting all other available state court remedies [ER 42-62; App. E-J, Q], Petitioner timely filed a petition for writ of habeas corpus under 28 U.S.C. §2254 with the United States District Court, Eastern District of Washington. [ER 1-14]. Said petition was later denied by order and judgment entered on February 7, 2003 [ER 530-46; App. B-C, Q]. In distinguishing the subject petition for

writ of habeas corpus from the facts in a similar sexual abuse case, *i.e.*, *Snowden v. Singletary*, 135 F.3d 732 (11th Cir.), *cert. denied*, 525 U.S. 963, 119 S.Ct. 405, 142 L.Ed.2d 329 (1998), the District Court opined that the evidence "against Mr. SHAFER was far stronger than the case against Mr. Snowden." [ER 535; App. C and Q]. In this vein, the Court concluded, notwithstanding serious issues of credibility which arose concerning such other testimony as Petitioner's former girlfriend, Lisa Ulrey, and the mother of one of the alleged victims who was an admitted drug addict and convicted felon, and who was also then in jail facing criminal charges herself in this matter [ER 191-92, 535; App. C and Q], that any error associated with the testimonies of Dr. Simms and Ms. Light were harmless under the standards set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). [ER 535; App. C and Q]. Specifically, the District Court stated that "the testimony (sic) of Dr. Simms and Ms. Light pale[d] in comparison to Ms. Ulrey's testimony." [ER 535; App. C and Q]. Consequently, the Court determined that it was unlikely that any constitution error associated with federal due process "had a substantial and injurious effect upon the verdict" as required in Brecht. [ER 535; App. C and Q].

A certificate of appealability was issued on March 17, 2003, allowing Petitioner to appeal the issues whether the decision of the District Court should be reversed and whether habeas corpus relief should have been granted in terms of Petitioner's due process rights under the United States Constitution having been violated with respect to the challenged testimonies of Dr. Simms and Ms. Light. [ER 549-51; App. D and Q]. Said certificate was confirmed by order of the United States Court of Appeals for the

Ninth Circuit on June 17, 2003. [App. Q]. Thereafter, and without elaboration as to its reasoning concerning the same, the Court of Appeals simply affirmed the judgment of the District Court by order entered on May 4, 2004. [App. A]. Petitioner then filed a motion for rehearing en banc which was later denied by order entered by the Court of Appeals on June 14, 2004. [App. M]. This petition for writ of certiorari follows that decision.

REASONS FOR GRANTING THE WRIT

Issuance of the requested writ of certiorari to the United States Court of Appeals for the Ninth Circuit is necessary in this case to secure and maintain uniformity of the decisions of this Court as envision under the provisions of Supreme Court Rule 10. The challenged panel decision of the Court of Appeals which was entered on May 4, 2004 [App. A], and which erroneously affirmed the earlier decision of the District Court dismissing Petitioner's petition for writ of habeas corpus in a criminal case, directly and unequivocally conflicts with the decision of the United States Supreme Court in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and, therefore, the intervention of this Court is required so as to secure and maintain uniformity of federal law as established by this Court. *See*, 28 U.S.C. §2254(d)(1). Furthermore, and as discussed below, this case involves questions of exceptional importance and public interest including (a) areas of evidence which are improper for expert testimony under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *see also*, *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *United States v. Charley*, 189 F.3d

1251 (10th Cir. 1999); (b) the denial of federal due process and fundamental fairness as confirmed by this Court in terms of the prohibition against a third party testifying and vouching for the credibility and veracity of the complaining witness and thereby invading the province of the jury alone to make such a determination as enunciated in the seminal decisions in *Snowden v. Singletary*, 135 F.3d 732 (11th Cir.), *cert. denied*, 525 U.S. 963, 119 S.Ct. 405, 142 L.Ed.2d 329 (1998); *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986); *see also*, *Lambright v. Stewart*, 220 F.3d 1022 (9th Cir. 2000), citing *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985); *United States v. Samara*, 643 F.2d 701 (10th Cir. 1981); and (c) the cumulative effect of such error which results in similar prejudice to the defendant and an indisputable denial of due process and fundamental fairness in a criminal proceeding. *Mak v. Blodgett*, 979 F.2d 614 (9th Cir. 1992); *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983); *Ewing v. Williams*, 596 F.2d 391 (9th Cir. 1979).

More specifically, and contrary to the challenged opinions of the Court of Appeals and District Court [App. A-C & M, the due process rights of Petitioner, as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution, were indisputably violated by the improper admission of the testimonies of Dr. Roy Simms and Robyn Light. [ER 311-46, 368-423]. Further, said violations did in fact result in prejudicial error in terms of said error having had a substantial and injurious effect or influence the jury's guilty verdict as enunciated in *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). There is no question Petitioner demonstrated that the challenged state court rulings [App.

D-L, Q], were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. §2254(d)(1).

With respect to Ms. Light, it is clear that the errors associated with her testimony were of constitutional magnitude in terms of violation of due process. Without question, an expert may not testify unless qualified, and that expert's proffered testimony is scientifically reliable and will assist the jury in understanding the issues. *United States v. Amaral*, 488 F.2d 1148, 1152-53 (9th Cir. 1973); *see also*, *State v. Black*, 109 Wn.2d 336, 341-42, 348, 745 P.2d 12 (1987). The government bears the burden of proving that an admission of expert testimony which is without such requisite foundation is harmless. *United States v. Velarde*, 214 F.3d 1204, 1211 (10th Cir. 2000). Further, expert testimony will not be permitted if it invades the province of the jury. *Id.*

Here, Ms. Light's testimony was not based upon any recognized scientific principle and, over defense objection [ER 368-423; App. K and Q], no foundation for the same was ever presented at trial. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also*, *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *United States v. Charley*, 189 F.3d 1251, 1266-67 (10th Cir. 1999). In this regard, novel scientific theories are admissible only if they are sufficiently established to have gained general acceptance in the scientific community. *Id.* Ms. Light's purported theories and opinions concerning the alleged truthfulness of children's statements which entail "sensory details" were both novel and, perhaps more accurately described as nothing short of conjecture and speculation on her part rather than based upon any recognized or

reliable scientific fact or principle. *Id.* Given the materiality and highly significant nature of Ms. Light's expert testimony to the prosecution's case against SHAFER, there can be no question that her testimony constituted a denial of due process. *Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir. 1983).

Furthermore, even if it could somehow be said the admission of Ms. Light's testimony simply entailed an evidentiary error and did not rise to the level of constitutional error, her testimony was nevertheless unreliable, not based upon any established scientific principles and, in light of the remaining evidence, rendered the trial of Appellant both arbitrary and fundamentally unfair so as to violate federal due process. *See*, *Mancuso v. Olivarez*, 292 F.3d 939, 956 (9th Cir. 2002). In this regard, Ms. Light's testimony concerning the presence of "sensory details" was based solely upon out-of-court statements which the complaining witnesses had made to a third party, the investigating detective, Edmond West Campbell. [ER 389, 397-416; App. K and Q]. Ms. Light never spoke directly to the children. [ER 374; App. K and Q]. She was not present at the interviews. Thus, she was not privy to the method, manner or mode of Detective Campbell's technique in eliciting information from the children which may or may not have been coercive or suggestive in nature. [ER 374, 389, 397-416, 421-23; App. K and Q].

Equally important, Ms. Light never had the opportunity to either view or consider the demeanor of the alleged victims during Detective Campbell's interviews of them. [ER 374, 389, 397-416, 421-23; App. K and Q]. On cross-examination, Ms. Light readily conceded the totally unreliable nature of her supposed scientifically-based opinions and expert testimony. [ER 374, 389, 397-416, 421-23; App.

K and Q]. For this reason alone, the trial court should never have been permitted her to testify in the first instance concerning so-called "sensory details." Moreover, the simple fact that the trial court gave the jury certain cautionary instructions concerning Ms. Light's alleged theories and opinions concerning "sensory details," and the possible lack of evidentiary foundation for such theories and opinions, those corrective measures, if they can honestly be called that, were simply too little too late. Common sense dictates that once the bell of Ms. Light's prejudicial testimony was rung, it could not be unrung by way of any curative instruction to the jury.

Furthermore, in terms of constitutional error involving a blatant violation of federal due process, the subject testimony of Ms. Light erroneously invaded the province of the jury in determining the credibility of the complaining witnesses. *See generally*, *Snowden v. Singletary*, 135 F.3d 732 (11th Cir.), *cert. denied*, 525 U.S. 963, 119 S.Ct. 405, 142 L.Ed.2d 329 (1998); *see also*, *Verlarde*, 214 F.3d at 1211; *Charley*, 189 F.3d at 1267. Needless to say, by denying certiorari in *Snowden*, this Court established that decision as controlling under federal law. *See*, 28 U.S.C. §2254(d)(1). In this vein, said testimony of Ms. Light improperly *vouched* for the credibility of the child witnesses or, at least as the State Appeals Court recognized, had the direct effect of buttressing their credibility in the eyes of the jury. Stated differently, the jury "may well have relied on the [expert opinion of Ms. Light] and surrender[ed] their own common sense in weighing the testimony" of the child witnesses. *United States v. Azure*, 801 F.2d 336, 340-41 (8th Cir. 1986).

In fact, just as had occurred in *Snowden*, the prosecution in this case repeatedly emphasized the importance of

Dr. Simms' and Ms. Light's testimonies *in substantiating the trustworthiness of the otherwise questions claims of the complaining witnesses.* [ER 473-92; App. K and Q]. Thus, the basic tenets of federal due process and fundamental fairness were without a doubt violated. *Lambright v. Stewart*, 220 F.3d 1022, 1029 (9th Cir. 2000) (citing *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)); *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985); *United States v. Samara*, 643 F.2d 701, 705 (10th Cir. 1981).

Moreover, when the remaining evidence in this case is considered, it is clear that the inflammatory, prejudicial nature of Ms. Light's testimony substantially and injuriously effected or influenced the jury's verdict in this case. *Brecht*, 507 U.S. at 638. Contrary to the District Court's judgment in this case [ER 530-45; App. B and C], as well as the apparent basis for the challenged decision of the Court of Appeals [App. A and M], this case is without question analogous to *Snowden v. Singletary*, *supra*. *See also*, *United States v. Velarde*, *supra*. The fact Ms. Light's evidence may or may not have been as "sweeping" as in *Snowden* is of no consequence. Her testimony had the unqualified effect of buttressing the complaining witnesses' credibility in the eyes of the jury and, thus, constituted error of constitutional magnitude. *See*, *Binder*, 769 F.2d at 602; *see also*, *Lambright*, 220 F.3d at 1029. Furthermore, when examined in context, it is far more likely Ms. Light's testimony could have readily been perceived by the jury as 100% proof of the truthfulness of the girls. In comparison, the expert testimony in *Snowden* was far less compelling or sweeping in that regard. There, the expert witness testified "that 99.5% of children tell the truth," and that he "had not personally encountered an instance

where a child had invented a lie about abuse." *Snowden*, 135 F.2d at 737. Based upon this testimony, the Court of Appeals granted habeas corpus relief. *Snowden*, 135 F.2d at 737-39; *see also*, *Velarde*, at 1211-12. Hence, the clear import of *Snowden* cannot be ignored in this case. *Id.*

Second, the District Court's reliance upon the testimony of Ms. Ulrey in concluding that any error associated with Ms. Light's testimony was harmless, is glaringly misplaced. The Court of Appeals overlooked crucial facts in this regard [App. A and M], as did the District Court in its underlying decision [App. B and C]. At best, the trustworthiness of Ms. Ulrey's testimony is highly questionable at the very least in terms of her awaiting criminal sentencing and also in terms of her likely motive of revenge against Petitioner in testifying as she did. [App. K and Q]. Furthermore, even if her testimony concerning the alleged abuse of her daughter was in any sense compelling as the District Court suggests in its decision [ER 535; App. K and Q], it is clear this evidence alone does not corroborate all the charges brought against the Petitioner in terms of all acts purportedly committed against all three alleged victims. Given the questionable nature of the remaining evidence against Petitioner, including that of Ms. Ulrey which the District Court relied upon, the violation of federal due process in terms of the Ms. Light's testimony cannot be deemed harmless insofar as that testimony can only be fairly described as having substantially and injuriously effected or influenced the jury's guilty verdict. *Brecht*, 507 U.S. at 638. The credibility of all three children's stories went to the heart of the prosecution's case against Petitioner. *Snowden*, 135 F.2d at 738; *see also*, *Velarde*, 214 F.3d at 1211-212. As a result, Petitioner is

entitled to the requested habeas corpus; the State Appeals Court concerning Ms. Light's testimony "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. §2254(d)(1). Thus, the petition for writ of habeas corpus should have been granted; the Court of Appeals was simply wrong in not reversing the District Court. *Id.* Even assuming, *arguendo*, that the foregoing constitutional challenges associated with Ms. Light's testimony were alone insufficient to constitute prejudicial error under *Brecht*, 507 U.S. at 638, the cumulative effect of such error, when considered with the further improper admission of Dr. Simms' testimony, certainly constituted such prejudicial error requiring habeas corpus relief. *See*, *Mak v. Blodgett*, 979 F.2d 614, 622 (9th Cir. 1992); *see also*, *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983); *Ewing v. Williams*, 596 F.2d 391, 395 (9th Cir. 1979). These combined errors were of constitutional magnitude; they had a substantial and injurious effect upon the verdict of the jury in this case as envisioned in *Brecht*, 507 U.S. at 638. *Id.*

The State Appeals Court treated this error as being constitutional in magnitude. [App. K and Q]. Suffice it to say, this determination is now res judicata and the law of this case. Likewise, this Court in *Young*, 470 U.S. at 18-19, also recognized that "vouching for the credibility of a witness" necessarily invades the province of the jury and denies federal due process. *See also*, *Lambright*, 220 F.3d at 1029. Thus, federal habeas corpus relief should have been granted. *Id.*; *see also*, 28 U.S.C. §2254(d)(1). Hence, the relief now requested should be granted as well.

CONCLUSION

Pursuant to Rules 10(a) and 10(c) of the Rules of the Supreme Court of the United States, and 28 U.S.C. §1254, Petitioner, DARRELL LEE SHAFER, respectfully requests that this Court accept his petition for writ of certiorari and that a writ be issued by this Court to the United States Court of Appeals for the Ninth Circuit to review the latter's opinions and orders in the case at bar.

DATED this 13 day of September, 2004.

Respectfully submitted,

BEVAN J. MAXEY
Attorney and Counsel of Record
for Petitioner Shafer

TABLE OF CONTENTS

APPENDICES

Page

Federal Opinions:

Appendix A: Order [United States Court of Appeals for the Ninth Circuit] unofficially reported at *Shafer v. Miller-Stout*, No. 03-35254 (9th Cir. May 4, 2004).....App. 1

Appendix B: Judgment [United States District Court, Eastern District of Washington] unofficially reported at *Shafer v. Miller-Stout*, No. CS-00-419-CI (E.Wash. February 7, 2003) .....App. 2

Appendix C: Order Adopting Report and Recommendation [United States District Court, Eastern District of Washington] unofficially reported at *Shafer v. Miller-Stout*, No. CS-00-419-CI (E.Wash. February 7, 2003).....App. 3

Appendix D: Order [United States District Court, Eastern District of Washington] unofficially reported at *Shafer v. Miller-Stout*, No. CS-00-419-FVS (E.Wash. March 17, 2003).....App. 20

Underlying State Court Opinions:

Appendix E: Certificate of Finality [Washington State Court of Appeals, Division III] unofficially reported in *In the Matter of the Application for Relief from Personal Restraint of Shafer*, No. 18972-4-III (January 18, 2001).....App. 23

Appendix F: Order [Supreme Court of the State of Washington] unofficially reported in *In the Personal Restraint Petition of Shafer*, No. 70139-3 (January 9, 2001).....App. 24

TABLE OF CONTENTS

APPENDICES – Continued

Page

Appendix G: Ruling Denying Review [Supreme Court of the State of Washington] unofficially reported in *In the Personal Restraint Petition of Shafer*, No. 70139-3 (October 27, 2000) .....App. 25

Appendix H: Order [Washington State Court of Appeals, Division III] unofficially reported in *In the Matter of the Application for Relief from Personal Restraint of Shafer*, No. 18972-4-III (July 27, 2000) .....App. 30

Appendix I: Mandate [Washington State Court of Appeals, Division III] unofficially reported in *State v. Shafer*, No. 16072-6-III (February 3, 1999) .....App. 41

Appendix J: Order [Supreme Court of the State of Washington] unofficially reported in *State v. Shafer*, No. 67051-0 (January 6, 1999) .....App. 43

Appendix K: Unpublished Opinion [Washington State Court of Appeals, Division III] unofficially reported in *State v. Shafer*, No. 16072-6-III (June 9, 1998) .....App. 44

Appendix L: Judgment and Sentence [Superior Court of Yakima County, State of Washington] unofficially reported in *State v. Shafer*, No. 95-1-01068-2 (September 13, 1996).....App. 60

Federal Opinion Denying Rehearing:

Appendix M: Order [United States Court of Appeals for the Ninth Circuit] unofficially reported at *Shafer v. Miller-Stout*, No. 03-35254 (9th Cir. June 14, 2004).....App. 73

TABLE OF CONTENTS

APPENDICES – Continued

Page

Constitutional Provisions Involved:

Appendix N: Fifth Amendment/United States Constitution.....App. 74

Appendix O: Fourteenth Amendment/United States Constitution .....App. 75

Statutory Provisions Involved:

Appendix P: 28 U.S.C. §2254(d)(1).....App. 77

Other:

Appendix Q: Opening Brief of Appellant [Partial-Statement of Facts] dated August 14, 2003, and filed in cause no. 03-35254 with the United States Court of Appeals for the Ninth Circuit.....App. 80

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 03-35254
CT/AG#; CV-00-00419-CI

DARRELL LEE SHAFER

Petitioner-Appellant

v.

MAGGIE MILLER-STOUT

Respondent-Appellee

(Filed June 25, 2004)

APPEAL FROM the United States District Court for the Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered May 4, 2004

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DARRELL LEE SHAFER, Petitioner,	)	NO. CS-00-419-CI
v.	)	**JUDGMENT**
MAGGIE MILLER-STOUT, Respondent.	)	(Filed Feb 07, 2003)

DECISION BY THE COURT:

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Report and Recommendation is ADOPTED; Darrell Lee Shafer's Petitition [sic] is **DENIED** and Judgment is entered.

DATED this 7th day of February, 2003.

JAMES R. LARSEN
District Court Executive/Clerk

/s/ [Illegible]
Deputy Clerk

cc: all counsel

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

DARRELL LEE SHAFER, Petitioner, v. MAGGIE MILLER-STOUT, Respondent.	No. CS-00-419-CI ORDER ADOPTING REPORT AND RECOMMENDATION (Filed Feb. 7, 2003)

DARRELL LEE SHAFER has filed a petition for a writ of habeas corpus. His petition was referred to United States Magistrate Judge Cynthia Imbrogno, who recommends that it be dismissed. For the reasons set forth below, the Court adopts her recommendation.

BACKGROUND

Mr. Shafer was convicted by a jury in Yakima County Superior Court of five counts of First Degree Rape of a Child, RCW 9A.44.073, two counts of First Degree Child Molestation, RCW 9A.44.083, and one count of Attempted First Degree Child Molestation, RCW 9A.44.083 and 9A.28.020. He received 360-month terms of imprisonment on two counts of First Degree Rape of a Child. He received lesser terms of imprisonment on the remaining counts. He is serving all terms of imprisonment concurrently.

Mr. Shafer appealed his convictions and sentences. The Washington Court of Appeals affirmed. He petitioned the Supreme Court of the State of Washington to grant discretionary review. His request was denied. Mandate was issued on January 6, 1999. On December 22, 1999, he sought post-conviction relief by filing a Personal Restraint

Petition ("PRP") with the state Court of Appeals. The Chief Judge dismissed his PRP. The state Supreme Court denied discretionary review.

On June 22, 2001, Mr. Shafer filed a petition for a writ of habeas corpus. 28 U.S.C. § 2254. His petition is governed by the Antiterrorism and Effective Death Penalty Act. Under the AEDPA, Mr. Shafer is entitled to relief only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

EXPERT TESTIMONY

At Mr. Shafer's trial, the prosecutor offered the opinions of two expert witnesses. One was Dr. Roy Simms, a pediatrician. He had conducted a physical examination of one of the complaining witnesses, a nine year old girl named Danielle. (Verbatim Report of Proceedings at 548-50.) Dr. Simms testified, without objection, that his "[d]iagnosis [was] sexual abuse." *Id.* at 564. The other expert was Robyn Light. She is employed by the Yakima County Prosecuting Attorney. She manages the victim-witness unit and she serves as a senior investigator. *Id.* at 611-14. Ms. Light testified about a number of issues. Among other things, she opined that children are incapable of describing events in terms of their senses – *i.e.*, by using the language of taste, touch, sight, smell or hearing – unless they actually have experienced the events they are describing. *Id.* at 619. Ms. Light referred to details such as these as "sensory details." *Id.* Ms. Light had not interviewed the complaining witnesses who testified against Mr. Shafer. They had been interviewed by another

law enforcement officer. The prosecutor asked Ms. Light to review the statements that the complaining witnesses had made to the other officer and to indicate whether their statements contained sensory details. Over Mr. Shafer's repeated objections, Ms. Light quoted numerous statements that, in her opinion, contained sensory details. *See, e.g., id.* at 639-46 and 652-56. Although the trial judge overruled Mr. Shafer's objections, he did give a number of limiting instructions during the course of Ms. Light's testimony. *Id.* at 636-37, 639-40, 643-44, 646-47, and 654.

On appeal, the Washington Court of Appeals evaluated the disputed expert testimony under Washington Rule of Evidence 702, concluding that Ms. Light's testimony helped the jury understand the significance of sensory details in the statements made by the complaining witnesses. In addition, the state Court of Appeals noted that Ms. Light had not commented directly upon Mr. Shafer's guilt or the complaining witnesses' veracity. As a result, the state appellate court upheld the admissibility of Ms. Light's testimony under Rule 702. *State v. Shafer*, No. 16072-6-III, 1998 WL 303864, at *4 (Wn. App. June 9, 1998). The testimony of Dr. Simms was a different matter. Since his diagnosis of sexual abuse was based exclusively upon statements he obtained from Danielle during the course of the physical examination, the state Court of Appeals ruled that his diagnosis should have been excluded. *Id.* However, in view of the "overwhelming untainted evidence" provided by other witnesses, the state Court of Appeals concluded that the error was harmless.[1]

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[1] The state court cited *State v. Florczak*, 76 Wn. App. 55, 74-75, 882 P.2d 199 (1994), as part of its harmless error analysis. By doing so, the

(Continued on following page)

Mr. Shafer claims the state appellate court erred in refusing to vacate his convictions based upon the allegedly erroneous admission of Dr. Simms's and Ms. Light's testimony. Magistrate Judge Imbrogno does not agree. Insofar as Ms. Light is concerned, she has concluded the state appellate court correctly rejected Mr. Shafer's allegation that Light vouched for the credibility of the complaining witnesses. For one thing, Ms. Light never stated directly that the girls were credible or that Mr. Shafer was guilty. For another thing, the trial judge repeatedly cautioned the jury regarding the limited admissibility of Ms. Light's testimony. Insofar as Dr. Simms is concerned, Magistrate Judge Imbrogno has concluded that the state appellate court properly ruled that the admission of his testimony was harmless. Besides the factors cited by the state court, she notes that Dr. Simms did not identify Danielle's alleged assailant.

Mr. Shafer objects to Magistrate Judge Imbrogno's conclusions on a number of grounds. Among other things, he argues that Ms. Light's testimony should have been excluded under Washington Rule of Evidence 702, that her testimony was fundamentally unreliable; that Dr. Simms and Ms. Light vouched for the credibility of the complaining witnesses; that Magistrate Judge Imbrogno failed to consider the compound effect of their testimony; and that the limiting instructions given by the trial judge only made things worse.

The standard governing this claim is clear. "A writ of habeas corpus will be granted for an erroneous admission

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court implied that the error in admitting Dr. Simms's testimony was of constitutional magnitude.

of evidence only where the 'testimony is almost entirely unreliable and . . . the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings,'" *Mancuso v. Olivarez*, 292 F.3d 939, 956 (9th Cir.2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 899, 103 S.Ct. 3383, 3398, 77 L.Ed.2d 1090 (1983)). Thus, it matters not whether the state Court of Appeals properly upheld the admissibility of Ms. Light's testimony under the Washington Rules of Evidence. *See, e.g., Dillard v. Roe*, 244 F.3d 758, 766 (9th Cir.2001) ("We need not decide . . . whether the admission of [the disputed] was error under California law."). To obtain habeas relief, Mr. Shafer "must show that the error rendered [his] trial so arbitrary and fundamentally unfair that it violated federal due process." *Mancuso*, 292 F.3d at 956 (internal punctuation and citations omitted). In an effort to satisfy that standard, Mr. Shafer cites a number of cases in which courts of appeal have addressed allegations of improper vouching. Magistrate Judge Imbrogno declined to follow these cases on the ground that Mr. Shafer failed to establish that their holdings reflect clearly established federal law as determined by the Supreme Court. Under the AEDPA, this is an important issue. The decision of a state court may not be overturned on habeas review simply because it is inconsistent with the ruling of a circuit court of appeals. *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir.1997). Furthermore, even if the cases cited by Mr. Shafer have some persuasive authority, *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir.), *cert. denied*, 531 U.S. 944, 121 S.Ct. 340, 148 L.Ed.2d 274 (2000), they do little to support his request for habeas relief. This can be seen by reviewing the facts of *Snowden v. Singletary*, 135 F.3d 732 (11th Cir.), *cert. denied*, 525 U.S. 963, 119 S.Ct. 405, 142 L.Ed.2d 329 (1998). In that case, an expert

testified "that 99.5% of children tell the truth," and that he "had not personally encountered an instance where a child had invented a lie about abuse." 135 F.3d at 737. The expert's testimony was especially troublesome because the prosecution's case against Mr. Snowden was based almost entirely upon the statements of three young children. *Id.* at 738. Mr. Shafer's case is much different. To begin with, neither Dr. Simms nor Ms. Light made the type of sweeping statements that occurred in *Snowden*. In addition, the case against Mr. Shafer was far stronger than the case against Mr. Snowden. One crucial distinction between the two cases is the testimony of Lisa Ulrey, Mr. Shafer's former girlfriend. She testified that, on more than one occasion, she was present when he sexually abused her daughter Danielle. (Verbatim Report of Proceedings at 431-440.) Not only is her account of her daughter's ordeal very powerful, but also the jury had reason to credit her testimony. At the time Ms. Ulrey testified, she was in the Yakima County Jail. She had pleaded guilty to two counts of being an accomplice to the First Degree Rape of a Child. She fully expected to be sentenced to two, consecutive ten-year terms of imprisonment. *Id.* at 427-28. Although she freely conceded that she previously had been convicted of serious crimes and that she was a drug addict, she appears to have held up well under cross-examination.[2] Thus, even if the admission of both Dr. Simms's and Ms. Light's testimony was error of constitutional magnitude, it

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[2] The following exchange is illustrative:

> Q [by defense counsel] Why was it important for you to have your sentencing after [Mr. Shafer's] trial?
>
> A Because I want to see him rot in hell.

(Verbatim Report of Proceedings at 452.)

is unlikely that the error had a substantial and injurious effect upon the verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Padilla v. Terhune*, 309 F.3d 614, 621-22 (9th Cir.2002) (discussing Supreme Court jurisprudence concerning harmless error standard). Quite frankly, the testimony of Dr. Simms and Ms. Light pales in comparison to Ms. Ulrey's testimony. Given this reality, Mr. Shafer cannot demonstrate that the Washington Court of Appeals' rulings regarding the testimony of Dr. Simms and Ms. Light were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.[3]"

INTIMIDATION OF DEFENSE WITNESSES

Prior to sentencing, Mr. Shafer moved for a new trial. (Verbatim Report of Proceedings at 1017.) He claimed that Edmond "Ed" Campbell, a detective with the Yakima County Sheriff's Office, contacted four persons who would have testified on his behalf and discouraged them from attending his trial. The trial judge denied Mr. Shafer's motion because he had not provided any evidence to support his allegations of witness tampering. *Id.* at 1062. Mr. Shafer did not seek direct review of the judge's ruling. However, he did challenge it in his PRP. He attempted to support his allegation of witness tampering by attaching affidavits to a brief.[4] One of the affidavits was from his mother, Onieta Shafer. She recounted statements made by

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[3] This is not to say Ms. Light's testimony would be admissible under Federal Rule of Evidence 702.

[4] The brief is Exhibit 11 in the "Submission of Relevant State Court Record."

Diane Binge-Cameron, who allegedly told Mr. Shafer's mother that she knew that someone other than Mr. Shafer had molested the children. Besides this affidavit, Mr. Shafer also submitted affidavits from Richard Baugher, Lynda Bass, and Robert C. Bass. All three said they were contacted by Detective Campbell and Mr. Shafer's trial attorney. According to all three, both Detective Campbell and Mr. Shafer's trial attorney told them that their testimony would not be helpful. The Chief Judge of the Washington Court of Appeals rejected Mr. Shafer's allegations of witness tampering because he did not "provide competent proof of this claim beyond mere conclusory or hearsay allegations." (Order Dismissing Personal Restraint Petition at 8-9.) Mr. Shafer argues that the Chief Judge erred by refusing to grant relief on this ground. Magistrate Judge Imbrogno does not agree. She says the evidence Mr. Shafer has submitted in support of this claim is insufficient, to the extent it is admissible, to warrant habeas relief. Furthermore, she says Mr. Shafer does not qualify for an evidentiary hearing under 28 U.S.C. § 2254(e).

One of the potential witnesses whom Detective Campbell allegedly contacted was Ms. Binge-Cameron. The comments attributed to her by Mr. Shafer clearly are hearsay. He has failed to cite any authority that requires a state court to grant post-conviction relief based upon hearsay for which no evidence of trustworthiness exists. *Cf. Murtishaw v. Woodford*, 255 F.3d 926, 958 (9th Cir.2001) (stale hearsay in an affidavit insufficient to warrant habeas relief), *cert. denied*, ___ U.S. ___, 122 S.Ct. 1313, 152 L.Ed.2d 222 (2002). A second potential witness was Mr. Baugher. He would have provided character testimony. The third and fourth potential witnesses were the Basses. Mr. Shafer did not inform the state appellate

courts just what they would have said at his trial. It now appears they would have testified that Mr. Shafer is a man of good character and that Lisa Ulrey, their adopted daughter, is a woman of bad character.[5] Thus, the testimony of the Basses was not unlike that of Mr. Baugher. All three were potential character witnesses whom Mr. Shafer's trial attorney decided not to call. Significantly, Mr. Shafer has failed to cite any authority that requires a state court to grant post-conviction relief based upon a defense attorney's decision to refrain from presenting cumulative testimony regarding his client's character.

In evaluating Magistrate Judge Imbrogno's recommendation on this issue, the Court assumes Detective Campbell contacted the four potential witnesses listed above. However, since it is undisputed that Mr. Shafer's trial attorney decided not to call these four persons as witnesses, Mr. Shafer is not entitled to habeas relief on this ground.

EFFECTIVE ASSISTANCE

Mr. Shafer claims that his trial attorney did not provide effective assistance. Magistrate Judge Imbrogno has concluded that Mr. Shafer properly exhausted two ineffective assistance claims, *viz.*, that his trial attorney failed to impeach Maria, one of the complaining witnesses, and that his trial attorney failed to subpoena Diane Binge-Cameron, Richard Baugher, Lynda Bass, and Robert C. Bass.

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[5] While Mr. Shafer submitted affidavits from the Basses to the state appellate courts indicating that they had been contacted by Detective Campbell, their affidavits did not indicate what they would have said had Mr. Shafer's trial attorney decided to call them as witnesses. Mr. Shafer attempted to fill this gap in the record by attaching affidavits from the Basses to his habeas petition.

Insofar as the alleged failure to impeach Maria is concerned, Magistrate Judge Imbrogno notes that the Washington Court of Appeals evaluated the merits of this claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which sets forth the governing standard. The issue, then, is whether the Court of Appeals resolved this claim in a manner that reflects an unreasonable application of the *Strickland* standard. *Williams v. Taylor*, 529 U.S. 362, 404-06, 120 S.Ct. 1495, 1519-20, 146 L.Ed.2d 389 (2000) (O'Connor, J., concurring); *Van Tran*, 212 F.3d at 1150 (summarizing Justice O'Connor's discussion of the phrase "unreasonable application"). Magistrate Judge Imbrogno has concluded that the Court of Appeals did not err. As she points out, the state court reviewed the Verbatim Report of Proceedings, noting that Mr. Shafer's trial attorney did not need to impeach Maria with a prior inconsistent statement because, during cross-examination, she provided him with favorable answers to his questions. *State v. Shafer*, No. 16072-6-III, 1998 WL 303864, at *6 (Wn. App. June 9, 1998). Furthermore, counsel's cross-examination appears to have been effective. On this particular count, the jury convicted Mr. Shafer of molestation rather than rape. *Id.*

Insofar as the alleged failure to subpoena witnesses is concerned, Magistrate Judge Imbrogno notes that Mr. Shafer first raised his claim in his PRP. The Chief Judge of the state Court of Appeals rejected it. However, in doing so, he evaluated the merits of this claim under the *Strickland* standard. The issue, then, is whether he resolved this claim in a manner that reflects an unreasonable application of the *Strickland* standard. Once again, Magistrate Judge Imbrogno has concluded that he did not err. As she points out, Mr. Shafer failed to provide the Chief Judge

with evidence from which he could have determined that the disputed witnesses would have had an impact upon the outcome of Mr. Shafer's trial. At most, Mr. Shafer provided the Chief Judge with conclusory allegations of ineffective assistance, and the Chief Judge cannot be faulted for failing to act upon these.

SUFFICIENCY OF THE EVIDENCE

On direct appeal, Mr. Shafer challenged the sufficiency of the evidence. The state Court of Appeals evaluated Mr. Shafer's contentions in light of the principles set forth in *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979), concluding that each count upon which the jury convicted Mr. Shafer was supported by evidence sufficient to support the conviction. *State v. Shafer*, No. 16072-6-III, 1998 WL 303864, at *4-*5 (Wn. App. June 9, 1998). Mr. Shafer renewed this challenge in his PRP. The Chief Judge examined Mr. Shafer's contentions in light of *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980), which discusses and applies *Jackson*. Thus, both Mr. Shafer's direct and collateral challenges regarding the sufficiency of the evidence were evaluated under the correct legal standard as established by the Supreme Court. After reviewing the record, Magistrate Judge Imbrogno has concluded that the state appellate court's rulings are not vulnerable to attack under § 2254. Mr. Shafer objects only to her conclusion regarding Count IV. This count alleged that, between December of 1994 and March of 1995, Mr. Shafer had sexual intercourse with Danielle, who was less than twelve years old, at a house located at 806 Southern Avenue, Selah, Washington. (Verbatim Report of Proceedings at 862-63.) Mr. Shafer argues that Danielle denied this allegation during

her testimony. *Id.* at 519. According to Mr. Shafer, the only evidence that supports this conviction is the testimony of Detective Campbell. *Id.* at 690. Mr. Shafer submits that Danielle's recantation fatally undermines this conviction on Count IV.

The issue raised by Mr. Shafer's argument is whether the state Court of Appeals applied *Jackson* in an unreasonable manner. In that regard, it is significant that the United States Supreme Court has never held that, in assessing the sufficiency of the evidence, a reviewing court must give greater weight to a victim's testimony at trial than to her pretrial statements to a law enforcement officer when her pretrial statements are admitted as substantive evidence at trial. To the contrary, it is clearly established that a reviewing court must defer to the factfinder's determinations regarding the credibility of witnesses. *See Hayes v. Woodford*, 301 F.3d 1054, 1084 (9th Cir.2002). Consequently, insofar as Count IV is concerned, Magistrate Judge Imbrogno correctly concluded that the state appellate court's resolution of Mr. Shafer's sufficiency-of-the-evidence claim was not unreasonable during either direct or collateral review.

REPETITIVE TESTIMONY

At trial, a number of witnesses related statements made by the complaining witnesses. Mr. Shafer argued on direct appeal and in his PRP that the repetition of their statements denied his right to a fair trial. The state Court of Appeals rejected this argument, noting that not all of the statements were repetitive and that the trial judge had taken steps to prevent undue repetition. *State v. Shafer*, No. 16072-6-III, 1998 WL 303864, at *5-*6 (Wn.

App. June 9, 1998). As Magistrate Judge Imbrogno points out, Mr. Shafer is not entitled to habeas relief based upon the allegedly erroneous admission of evidence unless "the error rendered the trial so arbitrary and fundamentally unfair that it violated federal due process." *Mancuso*, 292 F.3d at 956 (internal punctuation and citations omitted). Mr. Shafer has failed to cite any authority indicating that the state appellate court's resolution of this issue was inconsistent with clearly established Federal law as determined by the Supreme Court.

ADMISSION OF PARTY OPPONENT

Mr. Shafer complains that the trial court improperly admitted testimony that Mr. Shafer threatened Danielle and her mother. The state Court of Appeals upheld the admission of Mr. Shafer's threats under Washington Rule of Evidence 801(d)(2). Significantly, Mr. Shafer has failed to cite a single instance in which the United States Supreme Court has ruled that the admission of such testimony implicates a defendant's right to due process.

NEWLY DISCOVERED EVIDENCE

Mr. Shafer was convicted and sentenced in 1996. In 1999, Danielle's father, Randy Ulrey pleaded guilty to a charge of Second Degree Rape of a Child. He admitted that, during October of 1998, he had engaged in sexual intercourse with Danielle. By this time, the Washington Court of Appeals had affirmed Mr. Shafer's conviction. However, he had yet to seek post-conviction relief in state court. In his PRP, Mr. Shafer alleged that Mr. Ulrey's admission demonstrated that he was the one who had been abusing Danielle all along. Mr. Shafer sought state

post-conviction relief on essentially two grounds. He argued that his trial attorney had failed to investigate Mr. Ulrey aggressively enough and that Mr. Ulrey's plea constituted newly discovered evidence. The Chief Judge of the state Court of Appeals rejected both contentions.

With respect to the reasonableness of counsel's performance, the Chief Judge noted that he had called Mr. Shafer's sister, Barbara Sisk, as a witness. Ms. Sisk testified that she had discussed the issue of sexual abuse with Danielle. (Verbatim Report of Proceedings at 790.) Ms. Sisk insisted that Danielle never accused Mr. Shafer of abuse. *Id.* Instead, according to Ms. Sisk, Danielle indicated that Mr. Ulrey and another person were the perpetrators. *Id.* Given this testimony, the Chief Judge concluded that Mr. Shafer's trial attorney had made a reasonable effort to establish that Mr. Ulrey was the true offender.

With respect to whether Mr. Ulrey's guilty plea constituted newly discovered evidence, the Chief Judge noted that this issue was governed by a five-part test. Among other things, Mr. Shafer had to demonstrate that Mr. Ulrey's admissions were of such significance that, in all probability, they would have changed the outcome of the trial. The Chief Judge concluded that Mr. Shafer could not satisfy this requirement given the strength of the prosecution's case.

Mr. Shafer petitioned for review of the Chief Judge's decision by the Washington Supreme Court. A commissioner denied Mr. Shafer's petition. Among other things, he observed that Mr. Ulrey's statement on plea of guilty "proves only that [Danielle] was raped by a man other than Mr. Shafer in 1998. Even if that abuse began earlier,

it does not mean that [Danielle] was molested by only one man or otherwise contradict [Danielle's] testimony against Mr. Shafer." (Ruling Denying Review at 4.).

In petitioning for federal habeas relief, Mr. Shafer again cites Mr. Ulrey's plea of guilty. Magistrate Judge Imbrogno has construed Mr. Shafer's reliance upon Mr. Ulrey's guilty plea as an effort to assert a free-standing claim of innocence. *See, e.g., Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir.2002). This effort cannot succeed, she observes, because Mr. Ulrey's admission that he raped Danielle in 1998 is not inconsistent with the jury's determination that Mr. Shafer raped her in 1994 and 1995. Mr. Shafer objects to this conclusion. He argues that law enforcement officers and prosecutors in Yakima County refused to investigate Danielle's alleged assertion to Ms. Sisk that it was Mr. Ulrey who was abusing her. He insists that their refusal to investigate Mr. Ulrey, instead of him, has resulted in the conviction of an innocent man. However, despite the passion with which Mr. Shafer makes this argument, he has failed to demonstrate a flaw in the Magistrate Judge's analysis.

SENTENCE

Mr. Shafer was sentenced to a term of 30 years imprisonment. This was an exceptional sentence under state law. Mr. Shafer argues that this sentence was imposed in violation of his right to due process, especially as clarified by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Magistrate Judge Imbrogno disagrees. To begin with, she notes that most of the grounds upon which Mr. Shafer relies to attack the validity of his sentence involve issues of state law, which

are not cognizable in a federal habeas proceeding. In addition, she points out that he may not invoke *Apprendi*. This second point is the only one to which Mr. Shafer objects. He argues that he should be allowed to assert an *Apprendi* claim.

Mr. Shafer's conviction became final on January 6, 1999. *Apprendi* was decided on June 26, 2000. Since, as Magistrate Judge Imbrogno observes, *Apprendi* is a new constitutional rule of criminal procedure, it cannot be applied retroactively on collateral review unless it fits within the exceptions set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Magistrate Judge Imbrogno has concluded that *Apprendi* does not fit within the *Teague* exceptions. In that regard, she correctly anticipated the Ninth Circuit's holding on this issue. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir.2002).

VALIDITY OF RCW 9A.44.073

In his Personal [Restraint] Petition, Mr. Shafer alleged that RCW 9A.44.073, one of the statutes which he was charged with violating, is invalid because it lacks an enacting clause. The Chief Judge rejected this contention as frivolous. Magistrate Judge Imbrogno has determined that Mr. Shafer did not properly exhaust this claim and that it now is barred. She is correct. While Mr. Shafer's petition for discretionary review referred generally to the Fourteenth Amendment, this reference was too vague to give the Washington Supreme Court a full and fair opportunity to address any constitutional infirmity in RCW 9A.44.073. *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995) (per curiam).

IT IS HEREBY ORDERED:

Darrell Lee Shafer's petition for a writ of habeas corpus is denied.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to Mr. Shafer and to counsel for his custodian.

DATED this 6th day of February, 2003.

/s/ Fred Van Sickle
Fred Van Sickle
Chief United States
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DARRELL LEE SHAFER, Petitioner, v. MAGGIE MILLER-STOUT Respondent.	No. CS-00-419-FVS ORDER (Filed Mar 17, 2003)

THIS MATTER came before the Court based upon the petitioner's motion for appointment of counsel. The petitioner is representing himself; the respondent is represented by Assistant Attorney General Diana M. Sheythe.

BACKGROUND

Darrell Lee Shafer petitioned for a writ of habeas corpus. 28 U.S.C. § 2254. He sought habeas relief upon a number of grounds: the improper admission of expert testimony; intimidation of defense witnesses; ineffective assistance of counsel; insufficiency of the evidence to support his convictions; improper admission of repetitive testimony; improper admission of hearsay; newly discovered evidence; sentencing errors; and the unconstitutionality of one of the statutes which he violated. On February 7, 2003, the Court denied relief and dismissed Mr. Shafer's habeas petition. Mr. Shafer filed a notice of appeal on February 19, 2003.

CERTIFICATE OF APPEALABILITY

Mr. Shafer may not appeal the order denying habeas relief unless he qualifies for a certificate of appealability ("COA") under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2253 (c) (1) (A). He is eligible for a COA only if he has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c) (2). In *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), the Supreme Court clarified this standard, explaining that the showing required to satisfy the requirements of § 2253 (c) depends upon whether a claim was dismissed on the merits or on procedural grounds. If a claim was dismissed on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484, 120 S.Ct. at 1604. By contrast, if a claim was dismissed on procedural grounds, the petitioner must demonstrate, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* A few of Mr. Shafer's claims were dismissed on procedural grounds; most were dismissed on the merits. However, the only claim that arguably has merit is Mr. Shafer's allegation that his right to due process was violated by the improper admission of expert testimony. Insofar as this claim is concerned, jurists of reason could disagree with the Court's ruling. Thus, the Court will issue a COA with respect to this one claim.

APPOINTMENT OF COUNSEL

Mr. Shafer is being treated for Hepatitis "C." As a result, he urges the Court to appoint counsel to represent him on appeal. This request will be denied. Mr. Shafer does not have a constitutional right to have an attorney appointed to prosecute an appeal of the Court's order dismissing his habeas petition. *See Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir.1993). Nor does his illness constitute a special circumstance justifying the appointment of an attorney. 28 U.S.C. § 2254(h); 18 U.S.C. § 3006A(a) (2) (B) (district court may appoint counsel in the "interests of justice" in § 2254 action); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir.1983) (per curiam).

IT IS HEREBY ORDERED:

1. Mr. Shafer is granted a COA with respect to one issue, *viz.*, whether his right to due process was violated by the improper admission of expert testimony at his trial.

2. Mr. Shafer's motion for appointment of counsel (Ct. Rec. 56) is **DENIED.**

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to Mr. Shafer and to counsel for the respondent.

DATED this 16th day of March, 2003.

/s/ Fred Van Sickle
Fred Van Sickle
Chief United States
District Judge

APPENDIX E

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Application for Relief From Personal Restraint of: DARRELL L. SHAFER, Petitioner.	))))))	**CERTIFICATE OF FINALITY** No. 18972-4-III Yakima County No. 95-1-01068-2

The State of Washington to: The Superior Court of the State of Washington, in and for **Yakima** County

This is to certify that the Order Dismissing Personal Restraint Petition of the Court of Appeals of the State of Washington, Division III, filed on ***July 27, 2000*** *became final on* ***January 9, 2001****, no further review having been requested.*

cc: Darrell L. Shafer
Lauri M. Boyd

[SEAL] In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 18th day of January, 2001.

/s/ Patricia L. Crandall
Clerk of the Court of Appeals, State of Washington Division III

APPENDIX F

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of: DARRELL LEE SHAFER, Petitioner.	**ORDER** No. 70139-3 C/A No. 18972-4-III

Department I of the Court considered this matter at its January 9, 2001, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That Petitioner's Motion to Modify Commissioner's Ruling and Motion to Add New Grounds for Relief are denied.

DATED at Olympia, Washington this 9th day of January, 2001.

/s/ [Illegible]
CHIEF JUSTICE

APPENDIX G

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of DARRELL LEE SHAFER, Petitioner.	NO. 70139-3 RULING DENYING REVIEW

Darrell Shafer moves for discretionary review of an order of the Chief Judge of Division Three of the Court of Appeals dismissing his personal restraint petition. RAP 16.14(c); RAP 13.5(b).

Mr. Shafer was sentenced to an exceptional term of 360 months in prison based on convictions for repeatedly raping and molesting his girlfriend's daughter, D., molesting D.'s friend M., and attempting to molest M.'s sister, A. Mr. Shafer claims that his trial counsel represented him ineffectively, that the trial court made several erroneous evidentiary rulings, that the statutes under which he was convicted are invalid, that the evidence is insufficient to support his convictions, that the trial court erred in imposing an exceptional sentence, and that a guilty plea by another man mandates vacation of Mr. Shafer's convictions. Several of these contentions were rejected on appeal, and they all lack merit.

In June 1995, Mr. Shafer's girlfriend, L.U., told police that he had been sexually abusing D. for the past year. L.U. also said that Mr. Shafer had touched D.'s friends. M. and A. L.U. admitted she was present during Mr. Shafer's abuse of D. and pleaded guilty to two counts of complicity to first degree rape of a child.

D. gave several statements which corroborated her mother's allegations. And M. and A. said Mr. Shafer touched them with his hands and a purple vibrator one time when they spent the night with D.

Mr. Shafer was charged with seven counts of first degree rape of a child (six involving D. and one involving M.), seven alternative counts of first degree child molestation, and one independent count of child molestation involving A. The charged incidents allegedly occurred when D. was 9, M. was 8, and A. was 10. After finding all three girls competent to testify, the trial court held a hearing to determine the admissibility of their hearsay statements under RCW 9A.44.120. The court allowed the State to present statements the girls made to their school counselor, a social worker, and two investigating officers, as well as additional statements D. made to her mother and father. All three girls also testified, as did L.U., who told the jury she was present when Mr. Shafer repeatedly raped and molested D. L.U. and D. both also testified that Mr. Shafer threatened to kill them if they reported the abuse.

The State also called Dr. Roy Simms, who testified that he examined D. and found no physical trauma, but also that he diagnosed sexual abuse based on her statements. Robyn Light testified as an expert in interviewing child victims of sexual abuse. She said skilled interviewers look for "sensory details" in a child's statement to determine whether an allegation of sexual abuse warrants further investigation. Ms. Light also examined D.'s statement to the investigating detective and pointed to several sensory details it contained.

Mr. Shafer did not take the stand, but his sister testified to D.'s reputation for untruthfulness, and a longtime friend testified that he trusted Mr. Shafer to be alone with his own children, and never saw Mr. Shafer acting unnaturally toward D.

The jury found Mr. Shafer guilty of five of the rape counts, two alternative molestation counts, and attempted molestation. The court sentenced Mr. Shafer to exceptional terms of 360 months on two of the counts, and to concurrent standard range terms on the rest.

On appeal, Mr. Shafer claimed the trial court erroneously allowed expert testimony from Dr. Simms and Ms. Light, multiple repetitions of the children's out-of-court statements, and testimony that Mr. Shafer threatened D. and L.U. He also challenged the sufficiency of the evidence and the performance of his trial counsel. And in a pro se supplemental brief, Mr. Shafer accused the prosecutor and the trial judge of misconduct and claimed that substitution of certain jury instructions during deliberations and a delay in his sentencing violated due process. The Court of Appeals affirmed, and this court denied review.[1]

Mr. Shafer subsequently filed this personal restraint petition, renewing and in some instances expanding upon the claims he made on appeal. He also raised several additional issues involving evidence outside the record. That evidence includes newspapers accounts of Mr. Shafer's record fishing catch, affidavits from his mother relating her recollections of trial and her discussions with

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[1] *State v. Shafer*, 91 Wn. App. 1022 (1998), *review denied*, 137 Wn.2d 1003 (1999).

third persons,[2] and copies of a statement on plea of guilty in which D.'s father (Mr. U.) pleaded guilty to second degree rape of a child for engaging in sexual intercourse with her during the month of October 1998.

An issue that was rejected on the merits on appeal will not be reconsidered in a personal restraint petition unless the petitioner shows the ends of justice would be served thereby. *In re Jeffries*, 114 Wn.2d 485, 489, 789 P.2d 731 (1990); *In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). Also, simply "'revising' a previously rejected legal argument . . . neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." *In re Jeffries*, 114 Wn.2d at 488. I agree with the Chief Judge that Mr. Shafer has not identified any intervening change in the law or other reason why the ends of justice require reconsidering the various arguments he made on appeal.

The Chief Judge also properly found no merit in Mr. Shafer's new claims. As the Chief Judge explained, when a petitioner seeks relief based on facts outside the record, he must show he has admissible evidence to prove those facts. *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Much of the evidence Mr. Shafer submitted consists of his mother's description of her conversations with third persons, which is inadmissible hearsay. Mr. U.'s statement on plea of guilty is admissible as a statement against his penal interest. But it proves only that D. was raped by a man other than Mr. Shafer in 1998. Even if that abuse

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[2] Mr. Shafer concedes that he and his mother recall trial differently than the transcript recorded. Specifically, they claim D. testified that he never touched her.

began earlier, it does not mean that D. was molested by only one man or otherwise contradict D.'s testimony against Mr. Shafer. Also, the newspaper accounts of Mr. Shafer's fishing successes during the period of the charged crimes do not necessarily place him outside Yakima County during that period and were, in any event, available during trial. This is not "newly discovered evidence." *In re Lord*, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994).

Mr. Shafer's remaining arguments, including his challenges to his exceptional sentence and to the statute under which he was charged, are frivolous for the reasons explained in the Chief Judge's order.

Mr. Shafer has not shown that the Chief Judge erred in dismissing his personal restraint petition or that review is otherwise merited under RAP 13.5(b). The motion for discretionary review is denied.

/s/ [Illegible]
COMMISSIONER

October 27, 2000

APPENDIX H

The Court of Appeals
of the
State of Washington
Division III

In the Matter of the Application for Relief From Personal Restraint of:	**No. 18972-4-III**
DARRELL L. SHAFER,	**ORDER DISMISSING PERSONAL RESTRAINT PETITION**
Petitioner.	(Filed Jul. 27, 2000)

Darrell L. Shafer seeks relief from personal restraint imposed upon his Yakima County convictions for five counts of first degree rape of a child, two counts of first degree child molestation, and one count of attempted first degree child molestation. Mr. Shafer previously filed a direct appeal and this court affirmed. *See State v. Shafer*, slip opinion no. 16072-6-III (Wa. Ct. App. 1998).

As a personal restraint petitioner, Mr. Shafer must show not only error, but also actual and substantial prejudice resulting from alleged constitutional errors, or, for alleged nonconstitutional errors, a fundamental defect that inherently results in a miscarriage of justice, *In re Personal Restraint of Cook,* 114 Wn.2d 802, 810, 812, 792 P.2d 506 (1990). The petition must be supported by facts, not merely conclusory allegations, *Cook*, 114 Wn.2d at 813-14. The supporting evidence must be based on "more than speculation, conjecture, or inadmissible hearsay," and failure to meet this burden calls for dismissal of the petition, *In re Personal Restraint of Rice,* 118 Wn.2d 876.

886, 828 P.2d 1086 (1992), *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992).

Several of Mr. Shafer's contentions have already been addressed in the appeal. These include (1) the court erred in admitting the expert testimony of Robyn Light and Dr. Roy Simms, and their opinions invaded the province of the jury; (2) the evidence was insufficient to support the guilty verdicts for the five first degree rape of a child convictions against victim D.; (3) the court erred in allowing repetitive hearsay testimony from six state witnesses regarding victim D.'s accounts of sexual abuse; and, (4) his speedy sentencing rights were violated. Issues considered and rejected on their merits in the appeal will not be reconsidered absent a showing "the ends of justice would be served by reexamining the issue[s]." *In re Personal Restraint of Gentry*, 137 Wn.2d 379, 388, 972 P.2d 1250 (1999). Mr. Shafer has made no such showing; these issues will not be reconsidered.

Mr. Shafer also contends he received ineffective assistance from trial counsel. To establish ineffective assistance of counsel, Mr. Shafer must show that his attorney's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The first element of *Strickland* is met by showing that counsel's performance was not reasonably effective under prevailing professional norms. The second test is met by showing a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. There is a strong presumption that counsel's performance was reasonably effective. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P2d 816 (1987).

Mr. Shafer first says counsel was ineffective for failing to subpoena and call certain witnesses, including one expert. But Mr. Shafer does not specify how he was prejudiced by counsel's decisions not to pursue the witnesses. He provides no competent evidence to indicate how any particular witness would have helped his case. His claim therefore fails for lack of evidentiary support, *In re Personal Restraint of Rice,* 118 Wn.2d at 886. Moreover, a decision to call or not to call, or even interview, a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. *State v. Thomas,* 109 Wn.2d at 230; *State v. Piche,* 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied,* 390 U.S, 912, 88 S. Ct. 838, 19 L. Ed. 2d 888 (1968).

Mr. Shafer additionally claims counsel was ineffective for failing to adequately investigate allegations that the real perpetrator of the crimes was Randy U. – the father of victim D. This claim also fails. The record shows the defense did present this theory through a witness who testified D. never said Mr. Shafer abused her, but did say Mr. U. abused her. The jury found Mr. Shafer guilty irrespective of allegations against Mr. U. Mr. Shafer fails to show that counsel performed deficiently in this regard.

In the same vein, Mr. Shafer contends he is entitled to a new trial based upon newly discovered evidence that following Mr. Shafer's trial Mr. U. pleaded guilty to sexually abusing D. Newly discovered evidence is grounds for relief if there are material facts "which have not been previously presented and heard, which in the interest of justice require vacation of the conviction. . . . " RAP 16.4(c)(3). To prevail on this claim, Mr. Shafer must show that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have

been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994). Mr. Shafer's claim fails because the evidence of Mr. U.'s alleged abuse was presented at trial and is in that sense cumulative to the trial testimony. And the fact of Mr. U.'s guilty plea is unlikely to change the result of the trial due to strength of the evidence against Mr. Shafer on each count.

Next, Mr. Shafer contends the evidence was insufficient to support the first degree child molestation conviction involving victim M. (count VII) and the attempted first degree child molestation conviction involving victim A. (count VIII) because there was no physical evidence of abuse. In reviewing challenges to the sufficiency of the evidence this court is guided by *State v. Green,* 94 Wn.2d 216, 616 P.2d 628 (1980), which requires that the evidence and all reasonable inferences therefrom be viewed in a light most favorable to the State. Corroborative physical evidence is not required in child sex crime cases. *See State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991).

The State's evidence shows that in Yakima County on or between March and May 1995, Mr. Shafer rubbed 9-year-old M.'s vagina with his hands and a purple vibrator. During the same timeframe, he grabbed 10-year-old A.'s hand and tried to force her to touch his penis. (*See* RP 345-50, 394-95, 692-93, 869-71, 980-81). This is sufficient evidence for the jury to find Mr. Shafer guilty of both crimes beyond a reasonable doubt.

Mr. Shafer next contends the court erred in allowing the first three State's witnesses to testify that D. told them

Mr. Shafer had also sexually abused M. and A. Each of the three witnesses did so testify without objection. Mr. Shafer makes no showing that the testimony relating to charged conduct that the State in fact proved at trial through other properly admitted evidence was in any way unduly prejudicial. *See State v. Harris*, 48 Wn. App. 279, 285, 738 P.2d 1059, *review denied*, 108 Wn.2d 1036 (1987).

Mr. Shafer next contends the court erred in denying several motions for mistrial. The court's denial of a mistrial motion is reviewed for abuse of discretion. *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986). The test is whether the defendant was denied a fair trial. *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

Mr. Shafer's first alleged ground for a mistrial occurred when his girlfriend Lisa U., with whom he was living when he committed the crimes, repeatedly referred to him as a drug user. First, she volunteered during the State's direct examination that she was a drug user and inferred that he was too. The court admonished the jury to disregard testimony potentially implicating Mr. Shafer in drug use. (RP 435, 442). Ms. U. repeated similar comments during her cross examination, once stating that she and Mr. Shafer were using an eight ball per day, (RP 454). Defense counsel did not move to strike that answer. Ms. U. later stated during cross examination that Mr. Shafer was doing as many drugs as she was. (RP 457). The court did instruct the jury to disregard that comment. In these circumstances where the State did not specifically elicit any improper comments, the court did not abuse its discretion in denying the mistrial motion. (RP 468-69).

Mr. Shafer's second alleged ground for a mistrial occurred when the prosecutor asked victim D. on redirect if she testified truthfully when she told the jury what had happened with Mr. Shafer. D. answered "Yes," (RP 602). The court sustained the objection as outside the scope of cross examination and instructed the jury to disregard D.'s answer. Contrary to Mr. Shafer's contention, this did not invade the province of the jury. The court did not abuse its discretion in denying the mistrial motion.

Mr. Shafer's next alleged ground for a mistrial appears to instead be a challenge to the sufficiency of the State's evidence to take the case to the jury. As discussed in the direct appeal and the analysis, *supra*, the State presented sufficient evidence to support each challenged conviction.

Mr. Shafer's next alleged ground for a mistrial occurred during the State's closing argument when the deputy prosecutor, in asserting lack of motive for D. to fabricate the abuse charges, also stated that D.'s mother (Ms. U.) anticipates serving "two ten year prison terms, back to back" for her own involvement in the crimes. Counsel moved for a mistrial on the basis the deputy prosecutor, who was also involved in Ms. U.'s plea agreement, knew Ms. U. would not receive that much prison time and was therefore misleading the jury. (RP 912-13) The deputy prosecutor's statement was an exact reflection of Ms. U.'s testimony. (RP 412) In denying the mistrial motion, the court stated the influence of Ms. U.'s testimony was for the jury to decide, but that the particular sentence would be up to the sentencing judge. (RP 913-14) Mr. Shafer shows no abuse of discretion. Mr. Shafer's final alleged ground for a mistrial stemmed from the previous ground, except that the court denied the State's motion for

a mistrial based on the deputy prosecutor's claim that defense counsel personally attacked her credibility in front of the jury. Mr. Shafer shows no prejudice to him.

Mr. Shafer fails to show that any of his claimed irregularities were of a magnitude to prejudice his right to a fair trial. He shows no abuse of discretion in the denial of his mistrial motions. *State v. Mak*, 105 Wn.2d at 701.

Mr. Shafer next contends the court erred in denying his post-trial motion for new trial. Again, the abuse of discretion standard governs review. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996).

Mr. Shafer's first alleged ground for a new trial was claimed juror misconduct. The issue arose during deliberations when defense counsel apprised the court that a juror purportedly discussed specifics of the case with an acquaintance not involved in the trial and said Mr. Shafer was guilty. The judge thoroughly examined the juror on the record and was satisfied that the juror made no such communications and did nothing to prejudice Mr. Shafer. (RP 997-1002) Mr. Shafer makes no showing to the contrary.

Mr. Shafer's next alleged ground for a new trial was that the court erred in allowing the State to amend count VIII from first degree child molestation to attempted first degree child molestation after it rested its case. CrR 2.1(d) provides that the court may permit an information to be amended at any time before the verdict if the defendant's substantial rights are not prejudiced. Here, the record reflects the court properly allowed the amendment of count VIII to a lesser charge to conform to the State's proof. *See State v. Schaffer,* 120 Wn.2d 616, 620-21, 845 P.2d 281 (1993).

Mr. Shafer's next alleged ground for a new trial was claimed witness tampering by the deputy prosecutor and a police detective. In denying the motion, the court ruled Mr. Shafer had produced no proof of such conduct. Now, in his petition and supporting documents, Mr. Shafer also fails to provide competent proof of this claim beyond mere conclusory or hearsay allegations. *In re Personal Restraint of Rice*, 118 Wn.2d at 886.

Finally, to the extent Mr. Shafer also alleges judicial misconduct, the claim fails for the same reasons. All of Mr. Shafer's alleged grounds for a new trial lack merit.[1]

Next, Mr. Shafer contends the court erred in imposing an exceptional sentence based upon the aggravating factors of (1) abuse of position of a trust relationship with the child victim D. to facilitate the acts of abuse; (2) ongoing pattern of sexual abuse of D. by repeated acts over a prolonged period of time; and, (3) the operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purposes of the SRA.

This court engages in a 3-step inquiry when reviewing an exceptional sentence: (1) whether the trial court's reasons supported by the record, (2) whether the stated reasons justify an exceptional sentence as a matter of law, and (3) whether the trial court abused its discretion by imposing a sentence that is clearly excessive. *See State v. Grewe,* 117 Wn.2d 211, 214-15, 813 P.2d 1238 (1991). Mr. Shafer's challenges are under steps 1 and 3.

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[1] Two additional grounds mentioned by Mr. Shafer – claimed improper testimony of Dr. Simms and violation of his speedy sentencing rights – were addressed in the direct appeal and will not be revisited.

The court first found that Mr. Shafer lived with and had a close relationship with the mother of D. during August 1994 to May 1995. The court additionally found that Mr. Shafer used his position as the boyfriend of the child's mother to gain and maintain access to D. and used his authority to subject D. to multiple acts of sexual abuse. These findings are amply supported by the record and in turn provide a valid legal basis for an exceptional sentence for abuse of position of trust. (*See* RP 425, 429-39, 447, 482, 487-88). *See also State v. Fisher*, 108 Wn.2d 419, 427, 739 P.2d 683 (1987) (relationship with one in same household indicates trust relationship); *State v. P.B.T.*, 67 Wn. App. 292, 304, 834 P.2d 1051, *review denied*, 120 Wn.2d 1021 (1993) (that crime committed while trust relationship existed permits inference defendant used that position to facilitate crime).

Next, the court found that Mr. Shafer engaged in numerous acts of sexual abuse of D. over a prolonged period of time. The incidents of abuse occurred many times over the course of about a year and included conduct for which Mr. Shafer was not charged. (*See* RP 279, 285, 431-34, 477, 484, 512-13, 515-16, 532, 534, 645-46). The record thus supports this finding, which in turn provides a legal basis for an exceptional sentence for an ongoing pattern of sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. *See State v. Brown*, 55 Wn. App. 738, 755-56, 780 P.2d 755-56, *review denied*, 114 Wn.2d 1014 (1990).

Next, based upon Mr. Shafer's criminal history, the court calculated his offender score at "23" for each crime. This invokes the multiple offense factor, which is a valid aggravating circumstance and was listed as such at the time Mr. Shafer committed his crimes. *See* current RCW

9.94A.390(2)(i), and former RCW 9.94A.390(2)(g). Application of this factor is proper "when there is some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive sentencing range." *State v. Fisher,* 108 Wn.2d at 428. This inquiry is automatically satisfied when a defendant's high offender score is combined with multiple current offenses resulting in a standard range that imposes no additional penalty for some crimes. *State v. Stephens,* 116 Wn.2d 238, 243, 803 P.2d 319. (1991).

Here, with an offender score of "23" based on his eight current sex crimes and a prior criminal history of one forgery conviction and one conviction for possession of heroin, Mr. Shafer's offender score exceeded "9 or more" with consideration of just three of the current crimes, Mr. Shafer would therefore receive no additional punishment for five of the crimes if he received a standard range sentence. Thus, the court did not err in applying the multiple offense policy as an aggravating factor in this case. *State v. Stephens*, 116 Wn.2d at 243-44.

Regarding the length of the exceptional sentence, it is not clearly excessive unless it is clearly unreasonable, i.e., it was imposed on untenable grounds or for untenable reasons or is a sentence that no reasonable person would have imposed. *State v. Ritchie,* 126 Wn.2d 388, 392-93, 894 P.2d 1308 (1995). Mr. Shafer's 360-month sentence is 80 months over of the high end of the standard range for the first degree rape of a child crimes. The sentence was within the court's discretion.

Mr. Shafer next contends the court has violated his due process rights by requiring him to undergo polygraph

testing as a condition of community placement. To the contrary, a trial court has authority to impose monitoring conditions such as polygraph testing on sex offenders, *See State v. Riles,* 135 Wn.2d 326, 342, 957 P.2d 655 (1998).

Mr. Shafer's final contention is that the Revised Code of Washington is invalid law for lack of enacting clauses. Accordingly, he says the trial court lacked jurisdiction over his case in the first instance. These arguments are frivolous. The Revised Code of Washington is a compilation of the state's session laws. RCW 1.04.020. Although the Revised Code omits titles and enactment clauses, they are still part of the session laws. RCW 1.08.017. The statutes under which Mr. Shafer was convicted are all part of legislation that contained a title and enactment clause. *See* Laws of 1988, ch. 145 §§ 2, 5; Laws of 1990 ch. 3; Laws of 1994, ch. 271 § 303. Mr. Shafer's jurisdiction arguments therefore fail.

Mr. Shafer has not carried his burden under *In re Personal Restraint of Cook.*

Accordingly, the petition is dismissed pursuant to RAP 16.11(b).

DATED: July 27, 2000

/s/ Frank L. Kurtz
FRANK L. KURTZ
CHIEF JUDGE

APPENDIX I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DARRELL LEE SHAFER, Appellant.	**MANDATE** No. 16072-6-III Yakima County No. 95-1-01068-2

The State of Washington to: The Superior Court of the State of Washington, in and for ***Yakima*** County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on ***June 9, 1998*** *became the decision terminating review of this court in the above-entitled case on* ***January 6, 1999****. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.*

cc: Darrell Shafer
Kenneth E. Kanev
Lauri M. Boyd
Hon. Stephen M. Brown
Washington State Board of Prison Terms and Paroles
Department of Corrections

[SEAL]

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 3rd day of February, 1999.

/s/ Patricia L. Crandall
Clerk of the Court of Appeals,
State of Washington Division III

APPENDIX J

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DARRELL L. SHAFER, Petitioner.	No. 67051-0 **ORDER** C/A NO. 16072-6-III

All five members of Department I of the Court considered the matters set on its January 5, 1999, Motion Calendar, and unanimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That the Petition for Review is denied.

APPENDIX K

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DARRELL LEE SHAFER, Appellant.	No. 16072-6-III Division Three Panel Six UNPUBLISHED OPINION FILED JUN 09 1998

SCHULTHEIS, C.J. – Darrell Shafer was convicted of five counts of rape of a child, two counts of molestation and one count of attempted molestation. On appeal he contends (1) the testimony of two expert witnesses was improper and invaded the province of the jury; (2) the verdict is not supported by the evidence; (3) the admission of repetitive hearsay complaints of sexual abuse was unfairly prejudicial; and (4) he had ineffective assistance of counsel. Mr. Shafer argues pro se that his untimely sentencing date and the substitution of certain jury instructions during deliberations denied him due process. He also alleges prosecutorial and judicial misconduct. We affirm.

Early in June 1995, Lisa U. reported to the Yakima police that her boyfriend, Mr. Shafer, had been sexually abusing her daughter, D. During interviews several days later with two police officers and a Child Protective Services social worker, D described numerous sexual contacts involving Mr. Shafer's hands, mouth, penis and a purple vibrator. She also stated that Mr. Shafer had "touched" her two friends, sisters A and M. Both A and M were then

interviewed, and they described an incident when they had spent the night with D at Mr. Shafer's trailer. They claimed he touched them with his hands and the purple vibrator. All these incidents had occurred during the previous year, when D was 9, M was 8, and A was 10.

Mr. Shafer was arrested and charged in late June 1995 with three counts of first degree rape of a child (RCW 9A.44.073) or alternatively, three counts of first degree child molestation (RCW 9A.44.083).[1] This information was amended in August 1995 to seven counts of first degree rape of a child, with seven alternative counts of first degree child molestation, and one independent count of first degree child molestation. A competency hearing was held in October 1995 and the three children were found competent to testify at trial.

After a series of continuances, trial began in January 1996. The court first held a hearing pursuant to RCW 9A.44.120 and *State v. Ryan,* 103 Wn.2d 165, 691 P.2d 197 (1984), to determine whether out-of-court statements by D, A and M could be presented at trial.[2] Noting that all three

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[1] Lisa U. also was arrested and pleaded guilty to two counts of accomplice to first degree rape of a child.

[2] The statute provides, in part, that

"A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another [or] describing any attempted act of sexual contact with or on the child by another . . . not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings . . . if:

"(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

"(2) The child . . .

"(a) Testifies at the proceedings."

(Continued on following page)

children were scheduled to testify and that their statements appeared to be reliable, the court ruled the statements admissible. At trial, Randy U. (D's father), Lisa U., the girls' school counselor, the social worker, the two investigating police Officers and the three girls testified. Dr. Roy Simms testified that he found no trauma to D's body, but that her statements supported his diagnosis of sexual abuse.

Additionally, the State presented the testimony of Robyn Light, an expert in interviewing child victims of sexual abuse. Ms. Light testified that skilled interviewers look for "sensory details" to determine whether a sexual abuse allegation should be further investigated. Ms. Light did not interview D, A or M herself, but she examined the statements recorded by Detective Edmond Campbell. (Detective Campbell had not yet testified.) When the State asked Ms. Light if she detected sensory details in Detective Campbell's interviews, defense counsel objected, arguing that this line of questions concerned the credibility of the child witnesses and invaded the province of the jury. The trial court overruled the objection but gave four limiting instructions during this testimony. These instructions cautioned the jury that the facts relied on by Ms. Light may or may not be in the record, and the facts should only be considered as the basis for her opinion. The jury was also instructed that her opinion was relevant only to show whether or not each child's interview was consistent with Ms. Light's theories. Ms. Light related numerous instances of specific sexual conduct and graphic

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RCW 9A.44.120. *Ryan*, 103 Wn.2d at 175-76, musters a set of factors used to determine the reliability of the child's out-of-court statements.

details contained in Detective Campbell's interviews of D, A and M.

Following Ms. Light's testimony, the State called Detective Campbell to the stand. In response to defense objections and concerned that repetition of the victims' out-of-court statements could unfairly prejudice Mr. Shafer, the court ruled that the detective could not read from his record, but must summarize the information. He connected particular sexual acts with each victim, the time frame and the physical location. The State then rested.

The defense offered only two character witnesses. Following an unsuccessful motion to dismiss, the defense rested. The State then moved to again amend the information, changing Count VII to attempted first degree child molestation. Over defense objection, the motion was granted.

The jury instructions were crafted to relate each count with a specific victim, time range and address. After deliberations had begun, the jury sent an inquiry to the court noting that two counts were identical and one count did not mention which victim was involved. Counsel from both parties met with the trial court and agreed to withdraw two of the original instructions (Numbers 19 and 23) and substitute three corrected instructions (Numbers 19.1, 23.1 and 23.2). Later, before the verdict was given, defense counsel challenged a juror for contacting a third party and discussing the case. The trial court questioned the juror and decided there was no evidence the juror had been affected by any outside conversations or information. After the guilty verdict, the court polled the jurors and all declared that no juror had injected outside information into the deliberations.

Citing abuse of a position of trust and the operation of the multiple offense policy, RCW 9.94A.390(2), the trial court imposed an exceptional sentence of 360 months. The exceptional sentence is not challenged on appeal.

Mr. Shafer first assigns error to the admission of the expert testimony of Ms. Light and Dr. Simms. He contends Ms. Light's testimony impermissibly bolstered the credibility of the child witnesses and argues Dr. Simms based his diagnosis of sexual abuse entirely on his perception of D's truthfulness. Both experts, he asserts, improperly offered opinions on ultimate issues of fact.

Expert testimony is admissible pursuant to ER 702 if (1) the witness is qualified as an expert by experience, training or education; (2) the witness's opinion is based on a theory generally accepted in the scientific community;[3] and (3) the testimony is helpful to the trier of fact. *State v. Black,* 109 Wn.2d 336, 341, 745 P.2d 12 (1987). If the expert's testimony does not concern novel theories or technical matters, it need not meet the stringent requirements for general scientific acceptance. *State v. Ortiz,* 119 Wn.2d 294, 311, 831 P.2d 1060 (1992). The opinion may be based on the witness's training, experience, professional observations and acquired knowledge. *Ortiz,* 119 Wn.2d at 311; *State v. Jones*, 71 Wn. App. 798, 815, 863 P.2d 85 (1993), *review denied,* 124 Wn.2d 1018 (1994). The expert qualifications of Ms. Light and Dr. Simms are not challenged on appeal. Neither of them presented novel or sophisticated theories, Ms. Light's opinion regarding the

[3] Novel scientific theories are admissible only if they are sufficiently established to have gained general acceptance in the scientific community. *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir. 1923); *State v. Black,* 109 Wn.2d 336, 342, 745 P.2d 12 (1987).

sensory details of alleged sexual abuse was based an over 4,000 interviews she had conducted with children. Our focus, accordingly, is on the "helpfulness" of the expert opinions.

Generally, expert evidence is helpful if it concerns matters beyond the common knowledge of the layperson and does not mislead the jury. *State v. Jones*, 59 Wn. App. 744, 751, 801 P.2d 263 (1990), *review denied,* 116 Wn.2d 1021 (1991). Such evidence is not considered helpful if its prejudicial nature is great. *Black,* 109 Wn.2d at 348. While opinion testimony need not be excluded merely because it encompasses an ultimate issue of fact. *State v. Sanders*, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), no witness may testify as to the guilt of a defendant, whether by direct statement or inference. *Black,* 109 Wn.2d at 348. Neither may an expert usurp the exclusive function of the jury to weigh the evidence and determine credibility. *Jones,* 59 Wn. App. at 749 (quoting *State v. Fitzgerald,* 39 Wn. App. 652, 657, 694 P.2d 1117 (1985)).

Ms. Light testified that a skilled interviewer looks to see if a child includes sensory details when describing alleged incidents of sexual abuse. She told the jury children are incapable of describing the sights, sounds, smells and feelings that accompany specific acts unless they have directly experienced those acts. She then recited numerous examples of sensory details gleaned from Detective Campbell's interviews with D and M. In effect, she implied that D's and M's allegations of sexual abuse were truthful because they included multiple sensory details.

At one time, Washington courts might have frowned on such testimony. In *Black*, a social worker testified, that the alleged victim fit a profile for rape victims. The

Supreme Court held that this expert opinion unfairly prejudiced the accused by implying the complainant was telling the truth and indirectly offering an opinion on the accused's guilt. *Black,* 109 Wn.2d at 348-49. More recently, however, trial courts have given greater latitude to expert testimony that tends to corroborate the testimony of child sexual abuse victims. *See, e.g., State v. Holland*, 77 Wn. App. 420, 891 P.2d 49, *review denied,* 127 Wn.2d 1008 (1995); *State v. Florczak,* 76 Wn. App. 55, 882 P.2d 199 (1994), *review denied*, 126 Wn.2d 1010 (1995). In *Holland,* the appellate court held that because the credibility of the victim had been put in issue, an expert could testify it was not uncommon for a sexual abuse victim to delay reporting.[4] 77 Wn. App. at 427. A social worker in *Florczak* testified that several symptoms, suffered by an alleged victim "could be correlated with a child who has been sexually 'abused.'" 76 Wn. App. at 73. The appellate court held that this observation that the child exhibited behavior typical of a group was not a *conclusion* that the child had in fact been sexually abused or that the defendant was guilty. *Id.* Accordingly, the expert's testimony did not invade the jury's province to weigh the evidence and make credibility determinations. *Id.*

When viewed in the light of these recent opinions, Ms. Light's expert opinion may be considered helpful to the jury and not unfairly prejudicial. She testified that interviewers look for sensory details when deciding whether "a sex abuse allegation [is] something that [they] want to

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[4] The credibility of the victim is the central issue in most sexual abuse cases, because the testimony of the victim and the accused are usually in direct conflict. *Jones,* 59 Wn. App. at 749 (citing *Black,* 109 Wn.2d at 338; *Fitzgerald,* 39 Wn. App. at 657).

continue to investigate." She then recounted all the details she considered "sensory" in the interviews of D and M. Because she did not make a direct comment on the defendant's guilt or the victims' veracity, the jury was left to decide whether the details sufficiently supported the credibility of the victims and whether Mr. Shafer committed the offenses. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577-80, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994).

Dr. Simms, on the other hand, presented an inadmissible diagnosis of sexual abuse.[5] He offered no scientific basis for his opinion: the physical examination provided no evidence of abuse (although it did not rule out abuse) and his diagnosis was based entirely on the medical history he obtained from D. A doctor's diagnosis of sexual abuse is inadmissible if based only on the statements of an alleged victim. *State v. Carlson,* 80 Wn. App, 116, 125, 906 P.2d 999 (1995) (citing *Florczak*, 76 Wn. App. at 73-74; *State v. Alexander,* 64 Wn. App. 147, 154, 822 P.2d 1250 (1992); *Fitzgerald,* 39 Wn. App. at 656-57)). *See also State v. Pittman,* 88 Wn. App. 188, 197-98, 943 P.2d 713 (1997) (expert testimony must have an adequate foundation based an scientific evidence). In light of the overwhelming untainted evidence provided by D, M, A, D's father and mother, Ms. Light, Detective Campbell and the school counselor, however, we find that Dr. Simms's erroneously

[5] D's statements made to Dr. Simms in the course of his physical examination and treatment were properly admitted pursuant to ER 803(a)(4) and are not challenged on appeal (except as unnecessarily repetitive). Mr. Shafer assigns error only to the admission of Dr. Simms's diagnosis of sexual abuse.

admitted diagnosis was harmless. *See Florczak*, 76 Wn. App. at 75.

Mr. Shafer next contends the evidence is insufficient to support the guilty verdict on the five charges of rape involving victim D. He argues the evidence does not support the essential element of penetration required for each of these convictions.

A defendant who claims insufficiency of the evidence admits the truth of the State's evidence and recognizes that all reasonable inferences will be interpreted in the State's favor. *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997); *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). The test is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Myers*, 133 Wn.2d at 37; *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). The elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no more valuable than the other. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986).

First degree rape of a child, the charge in disputed counts I, II, IV, V and VI, requires proof of sexual intercourse with a child less than 12 years old.[6] RCW 9A.44.073(1). Sexual intercourse is defined as any penetration, "however slight" of the vagina or anus or any sexual contact of the sex organs of one person and the mouth or anus of another. RCW 9A.44.010(1). Sexual

[6] The perpetrator also must be at least 24 months older than the child and not married to the child. RCW 9A.44.073(1).

contact means touching the sexual or intimate parts of another person for sexual gratification. RCW 9A.44.010(2). A child's complaint of pain during sexual contact supports a reasonable inference of penetration. *State v. Biles*, 73 Wn. App. 281, 284-85, 871 P.2d 159, *review denied*, 124 Wn.2d 1011 (1994). Vaginal penetration requires proof that the defendant penetrated, at a minimum, the victim's labial lips. *State v. Bishop*, 63 Wn. App. 15, 19, 816 P.2d 738 (1991), *review denied,* 118 Wn.2d 1015 (1992).

We find circumstantial or direct evidence of penetration in the record to support each of the five convictions for rape of D. Additionally, each count is specifically limited to a particular time frame and location. D, D's mother and/or Detective Campbell (testifying as to D's hearsay statements during his interviews) described actual or inferred penetration of D's labia by Mr. Shafer's fingers, penis or vibrator (counts I, II, V and VI). Although D's mother originally testified she shut her eyes whenever Mr. Shafer put his penis to D's vagina, she admitted she heard her daughter struggle and scream and later remembered seeing the vibrator and Mr. Shafer's penis go into her daughter. Detective Campbell testified that D told him Mr. Shafer put his penis in her mouth (count IV). Viewing the evidence and the inferences in the light most favorable to the state, we find that sufficient evidence supports the jury's verdict on each count.

Mr. Shafer next contends the trial court erred by allowing six witnesses to repeat D's accounts of sexual abuse. He claims the statements of these witnesses were cumulative and prejudicial.

Before trial, the court examined D's hearsay statements to determine their reliability pursuant to RCW

9A.44.120. The statute specifically authorizes the admission of such statements when the child is available and competent to testify. RCW 9A.44.120. Mr. Shafer does not challenge the admissibility of D's out-of-court statements; he merely contends their repetition was unnecessarily cumulative.

It is true that statements admissible under the child hearsay statute are still subject to analysis under ER 403, which permits exclusion of evidence if its probative value is substantially outweighed by the danger of prejudice caused by needless presentation of cumulative evidence. *State v. Bedker*, 74 Wn. App. 87, 93, 871 P.2d 673, *review denied*, 125 Wn.2d 1004 (1994). The trial court here carefully exercised its discretion to avoid cumulative evidence. Early on, it noted its desire to keep repetition at a minimum. After a police officer introduced some of D's hearsay statements, the court told the parties (in camera) it was aware of the concerns regarding needless repetition and promised to balance the relevance of each statement with its prejudicial effect under ER 403.

The school counselor, the social worker and one of the officers were allowed to repeat statements D made to them. Each of these witnesses provided slightly different information and they were not merely repetitive. Randy U. stated only that D told him Mr. Shafer had been "messing" with her private parts. Because Ms. Light recited almost every sensory detail contained in Detective Campbell's report, the detective's testimony was stringently limited. Concerned that repetition of the details would be unnecessarily prejudicial, the court ordered him to summarize D's statements. Ms. Light's testimony, although loaded with incriminating detail, was not offered for the proof of the

statements and did not tie specific acts to particular times and places. All in all, the court's careful exercise of discretion to admit some statements and exclude others was not abused.

Mr. Shafer also assigns error to the trial court's decision to allow D and Lisa U. to testify that he threatened to kill them. These statements were not hearsay and were admissible under ER 801(d)(2) as admissions of a party opponent. *See State v. Anderson*, 44 Wn. App. 644, 651, 723 P.2d 464 (1986), *review dismissed as moot* 109 Wn.2d 1015 (1997). Mr. Shafer's contention that the court erred in admitting D's hearsay statements that he abused A and M is also without merit. He failed to object to this testimony at trial and admits the error is nonconstitutional. Accordingly, his argument will not be considered on appear RAP 2.5(a); *State v. Riley,* 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Mr. Shafer next contends he had ineffective assistance of counsel. During the pretrial competency hearing, M stated that Mr. Shafer did not penetrate her body with his body or the vibrator. At trial, however, she testified on direct that he put the "massager" inside her "private." He contends his trial counsel should have cross-examined M with her prior inconsistent statement and that the failure to do so requires reversal of his conviction for first degree child molestation of M.

To establish ineffective assistance of counsel, Mr. Shafer must show that his attorney's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). We strongly

presume counsel's performance was reasonably effective. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Conduct that may be characterized as legitimate trial tactics will not serve as the basis for a claim of ineffective assistance of counsel. *Hendrickson*, 129 Wn.2d at 77-78.

Here, although Mr. Shafer's trial counsel did not try to impeach M with her prior inconsistent statement, he did not need to. During his cross-examination he asked her if the massager went "all the way inside" her. She said no. He then asked if Mr. Shafer just rubbed it on the outside. She nodded yes. Finally, he asked if the massager went inside her anus. Again, she said no. Clearly he did not need to mention her prior inconsistent testimony because he was able to elicit the answers he wanted anyway. Further, even if he had failed to impeach her statement on direct that the vibrator entered her private, the error evidently was not prejudicial. He was, after all, convicted only of child molestation, which does not require the element of penetration.

Mr. Shafer raises several additional issues pro se. First, he contends the trial court erred in altering some of the instructions after the jury had begun deliberations, violating his due process rights. He further argues the discussions of the instructions were unauthorized ex parte communications between the jurors and the prosecutor or court. Finally, he contends the trial court violated his constitutional right to a speedy sentencing.

Contrary to Mr. Shafer's argument, it is within the sound discretion of the trial court to give supplemental instructions to the jury during deliberations. *State v. Ng*,

110 Wn.2d 32, 42, 750 P.2d 632 (1988); CrR 6.15(f)(1).[7] Mr. Shafer contends the jury communicated ex parte with the prosecutor when it sent its inquiry to the prosecutor while the trial judge was out of town. Receipt of the jury's inquiry note was not a "communication." Further, the comments of the trial court when it was presenting the substitute instructions to the jury indicate that defense counsel and the prosecutor considered the jury note together when it was received. Both counsel and the trial judge worked together to draft the substitute instructions and neither party objected to the instructions when they were presented to the jury. Mr. Shafer's insistence that the trial judge and the prosecutor revised the instructions again the next day without the presence of defense counsel is unsupported by the record. Although he claims his mother heard the judge order the return of "the Jury papers" for rewording, the instructions in the record are identical to the ones read to the jury the day before. Accordingly, even if error had occurred, there was no prejudice. *State v. Ashcraft*, 71 Wn. App, 444, 463-64, 859 P.2d 60 (1993) (citing *State v. Caliguri*, 99 Wn.2d 501, 508-09, 664 P.2d 466 (1983)).

Mr. Shafer's speedy sentencing issue is also without merit. At the time of his verdict on February 5, 1996, the trial court ordered a presentence investigation and

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[7] The rule provides that

"(1) After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to the parties or their counsel. Any additional instruction upon any point of law shall be given in writing." CrR 6.15(f).

acknowledged that the investigative report would not be ready in less than 40 days. Six months later, at the sentencing hearing, his counsel admitted the "vast majority of the delay" in sentencing was due to his own schedule. Arguing that he could not waive his client's right to a speedy sentencing, he asked for a dismissal of the case or a sentence within the standard range. The State responded that the delay was not willful and was attributable to conflicts in the schedules of both parties as well as of the court. Noting that the emphasis should be on a careful presentence investigation and the availability of all parties rather than on speed, the court found that Mr. Shafer was not prejudiced by the delay.

While speedy sentencing rights are guaranteed by statute and court rule, *State v. Ellis,* 76 Wn. App. 391, 394-95, 884 P.2d 1360 (1994), an extension of the time for sentencing is discretionary with the trial court. *State v. Garibay,* 67 Wn. App. 773, 777, 841 P.2d 49 (1992). Only a delay in sentencing that is purposeful or oppressive will constitute a violation of a defendant's speedy sentencing rights. *Ellis*, 76 Wn. App. at 394 (citing *Pollard v. United States*, 352 U.S. 354, 361, 77 S. Ct. 481, 1 L. Ed. 2d 393 (1957)). The court must consider the length and reason for the delay, whether the defendant asserted his or her right, and the extent of prejudice to the defendant. *Ellis*, 76 Wn. App. at 394. CrR 7.1 requires the court to set a date for sentencing in compliance with RCW 9.94A.110, which requires a sentencing hearing within 40 days after conviction. *Ellis,* 76 Wn. App. at 394-95. The hearing date maybe extended for good cause on a motion by either party or the court. RCW 9.94A.110; *Ellis*, 76 Wn. App. at 395.

Mr. Shafer asserted his right to a speedy sentencing at his sentencing hearing and argues on appeal he was

prejudiced by the delay because he was forced to wait in the county jail, where he was denied access to cigarettes, television, radio, newspapers and outside exercise. The record contains no evidence that either party or the court moved for an extension of time pursuant to RCW 9.94A.110. In *Ellis,* the appellate court found that a delay of almost two years, caused entirely by the trial court and the prosecutor, was oppressive. 76 Wn. App. at 395. The six-month delay here, admittedly the fault of Mr. Shafer's counsel as well as due to the busy schedules of the court and prosecutor, does not appear as prejudicial. Unlike the case in *Ellis*, Mr. Shafer's sentencing did not fall "through the cracks." 76 Wn. App. at 393. Apparently the court here delayed sentencing until it was confident the presentence investigation had been given sufficient time and the parties were available. We find no abuse of judicial discretion.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

/s/ John Schultheis
Schultheis, C.J.

WE CONCUR:

/s/ Sweeney, J.
Sweeney, J.

/s/ Kurtz, J.
Kurtz, J.

APPENDIX L

SUPERIOR COURT OF THE
STATE OF WASHINGTON, COUNTY OF YAKIMA

STATE OF WASHINGTON Plaintiff. vs. DARRELL LEE SHAFER Defendant. SID NO.: WA 13339773 Motor Vehicle Involved: Yes ☐ No ☐ D.L. # _____	No. 95-1-01068-2 JUDGMENT AND SENTENCE (FELONY) (Filed Aug. 6, 1996) HEARING File No _____

1. A sentencing hearing in this case was held: 08/06/96 (DATE) DOB: 02/07/59 M/F M Race: W

2. Present were:

DARRELL LEE SHAFER , Defendant
GEORGE TREJO , Defendant's Lawyer
PATRICIA D. POWERS , Deputy Prosecuting Attorney

3. Count(s) _____ have been dismissed by the court.

4. Defendant was asked if there was any legal cause why judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report and case record to date, the court finds:

1. CURRENT OFFENSE(S): The defendant was found guilty on FEBRUARY 05, 1996 (DATE)

☒ by jury verdict
☐ by plea of guilty
☐ by court trial

Count No. I
Crime: FIRST DEGREE RAPE OF A CHILD
RCW: 9A.44.073
Date of Crime: btn August 1994-Dec. 1994
Law Enforcement Incident No. YAKIMA S.O. 95-10093

Count No. II
Crime: FIRST DEGREE RAPE OF A CHILD
RCW: 9A.44.073
Date of Crime: btn Dec. 1994-March, 1995
Law Enforcement Incident No. YAKIMA S.O. 95-10093

Count No. III
Crime: FIRST DEGREE CHILD MOLESTATION
RCW: 9A.44.083
Date of Crime: btn Dec. 1994-March, 1995
Law Enforcement Incident No. YAKIMA S.O. 95-10093

( ) Count(s) _____ Includes a special verdict/finding for use of a deadly weapon/sexual motivation, attached hereto.

( ) Count(s) _____ Current offenses encompassed the same criminal conduct and count as one crime in determining the offender score.

(X) Additional current offenses are attached in Appendix A.

2. CRIMINAL HISTORY: Prior criminal history used in calculating the offender score (RCW 9.94A.3.60) is:

CRIME	SENTENCING DATE	ADULT/ JUVENILE	CRIME DATE	CRIME TYPE
FORGERY	~~02/24~~/92	A		NV
POSSESSION OF HEROIN	~~05/17~~/93	A		NV

( ) Additional criminal history is attached in Appendix B.

3. OTHER CURRENT CONVICTIONS Under other cause number used to determine offender score.

CRIME	CAUSE NUMBER
NONE	

KIM M. EATON, YAKIMA COUNTY CLERK

SENTENCING DATA		OFFENDER SCORE	OFFENSE SCORE	RANGE	MAXIMUM TERM
Count No.	I :	23	xI	210-280 months	LIFE
Count No.	II :	23	xI	210-280 months	LIFE
Count No.	III :	23	x	149-198 months	LIFE

(x) Additional current offense(s) sentencing information is attached in Appendix C:

5. EXCEPTIONAL SENTENCE: (xx) Substantial and compelling reasons exist which justify a sentence (above) (~~below~~) the standard range for Count(s) I II. See Appendix D.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the crime(s) of: COUNT #1 – FIRST DEGREE RAPE OF A CHILD
COUNT #II FIRST DEGREE RAPE OF A CHILD
COUNT #III – FIRST DEGREE CHILD MOLESTATION
COUNT #IV – FIRST DEGREE RAPE OF A CHILD
COUNT #V – FIRST DEGREE RAPE OF A CHILD

IV. ORDER

SEE ATTACHED APPENDIX (I)

IT IS ORDERED that the defendant serve the determinate sentence and abide by the conditions set forth below.

1. THE DEFENDANT shall pay the financial obligations as set forth in APPENDIX E. The defendant shall be under the jurisdiction to this court and the Department of Corrections, Community Corrections Office, Yakima, or such other office as may be designated for up to 10 years for purposes of payment of the financial obligations. During the time payments remain due, the Office may order the defendant to report to a community corrections officer, remain within prescribed geographical boundaries, and/or notify the office of changes in address and employment.
2. OTHER orders and conditions follow on the attached pages of this judgment. File #A-663-95-alt

DARRELL LEE SHAFER
DEFENDANT'S NAME

WA 13339773
SID NUMBER

CONFINEMENT OVER ONE YEAR

1. Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows:

360 ~~280~~	Months for Count No.	I 198 Months for count No.: VII.
360 ~~280~~	Months for Count No.	II 148 Months for Count No.: VIII
198	Months for Count No.	III
280	Months for Count No.	IV
280	Months for Count No.	V
280	Months for Count No.	VI

(X) The terms in Counts I, II, III IV V VI VII VIII are concurrent for a total term of ~~280~~ 360 Months,

~~(X) The terms in Counts I, II are consecutive for a total term of 560 Months.~~

( ) The sentence herein shall run (concurrently) (consecutively) with the sentence in _____

(X) Defendant shall comply with the mandatory provisions of RCW 9.94A.120(8b) and all of those in RCW 9.94A.120(8c) ~~except~~ AS CONTAINED IN APPENDIX (H)

(X) DEFENDANT SHALL PAY ALL FINANCIAL OBLIGATIONS AS ORDERED IN THE ATTACHED FINANCIAL ORDER.

Credit is given for 397 days served.

The following Appendices are attached to this Judgment and Sentence and are incorporated by reference:

(X) A. Additional Current Offenses.
ADDITIONAL CURRENT CONVICTIONS ATTACHED AS APPENDIX (I)

( ) B. Additional Criminal History
(X) APPENDIX H

(X) C. Current Offense(s) Sentencing Information.
(X) D. Exceptional Sentencing Findings of Fact and Conclusions
(X) E. Financial Order.

Date: August 06, 1996 /s/ S.M. Brown
(JUDGE) (JUDGE PRO TEM)

Presented by

Deputy Prosecuting Attorney WSBA # 6825

Approved as to form:

Attorney for Defendant

THE STATE OF WASHINGTON
WARRANT OF COMMITMENT

To: the Sheriff of Yakima County.

The defendant DARRELL LEE SHAFER has been convicted in the Superior Court of the State of Washington of the crime(s) of: CT. #I –FIRST DEGREE RAPE OF A CHILD; CT. #II – FIRST DEGREE RAPE OF A CHILD; CT. #III – FIRST DEGREE CHILD MOLESTATION; CT. #IV – FIRST DEGREE RAPE OF A CHILD; COUNT #V – FIRST DEGREE RAPE OF A CHILD; CT. #VI – FIRST DEGREE RAPE OF A CHILD; CT. #VII – FIRST DEGREE CHILD MOLESTATION; CT. #VIII – ATTEMPTED FIRST DEGREE CHILD MOLESTATION

and the Court has ordered that the defendant be punished as set out in the attached Judgment and Sentence. Defendant shall receive credit for time served as ordered.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections.

YOU, THE OFFICERS OF THE DEPARTMENT OF CORRECTIONS ARE COMMANDED to receive the

defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

[SEAL]

DATE: August 06, 1996

By the Direction of the Honorable Stephen M. Brown
(JUDGE) (~~JUDGE PRO TEM~~)

ADDRESS OF DEFENDANT:

KIM M. EATON
Clerk

By: /s/ Tracy [Illegible]

APPENDIX A: Additional Current Offenses

COUNT NO.: IV

CRIME: FIRST DEGREE RAPE OF A CHILD

RCW: 9A.44.073

DATE OF CRIME: between December, 1994 – March, 1995

LAW ENFORCEMENT NO.: YAKIMA S.O. 95-10093

COUNT NO.: V

CRIME: FIRST DEGREE RAPE OF A CHILD

RCW: 9A.44.073

DATE OF CRIME: between March and May, 1995

LAW ENFORCEMENT NO.: YAKIMA S. O. 95-10093

COUNT NO.: VI

CRIME: FIRST DEGREE RAPE OF A CHILD

RCW: 9A.44.073

DATE OF CRIME: between March and May, 1995

LAW ENFORCEMENT NO.: YAKIMA S. O. 95-10093
COUNT NO.: VII

CRIME: FIRST DEGREE CHILD MOLESTATION

RCW: 9A.44.083

DATE OF CRIME: between March and May, 1995

LAW ENFORCEMENT NO.: YAKIMA S.O. 95-10093

COUNT NO.: VIII

CRIME: ATTEMPTED FIRST DEGREE CHILD MOLESTATION

RCW: 9A.44.083/9A.28.020

DATE OF CRIME: between March and May, 1995

LAW ENFORCEMENT NO.: YAKIMA S. O. 95-10093

APPENDIX C

ADDITIONAL CURRENT OFFENSES SENTENCING INFORMATION

DEFENDANT: DARRELL LEE SHAFER

CAUSE NUMBER: 95-1-01068-2

SENTENCING DATA	OFFENDER SCORE	OFFENSE SCORE	RANGE	MAX. TERM
Count No.: IV	23	XI	210-280 MOS.	LIFE
Count No.: V	23	XI	210-280 MOS.	LIFE
Count No.: VI	23	XI	210-280 MOS.	LIFE

Count No.:	VII	23	X	149-198 MOS.	LIFE
Count No.	VIII	23	X	111.75-148.50 MOS.	10 YRS.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DARRELL LEE SHAFER, Defendant.	NO. 95-1-01068-2 FINANCIAL ORDER APPENDIX E

SID NO.: WA 13339773

The defendant having been found guilty of a felony and represented by George Trejo, an attorney. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds the defendant has the ability or likely future ability to pay the financial obligations imposed herein:

IT IS ORDERED:

Defendant shall pay the following costs, assessments, fines and restitution to the Yakima County

Superior Court Clerk, Rm. 323 Yakima County Courthouse, Yakima, WA.

$100.00 (subject to modification) Restitution Distributed to: _____

$500.00 Victim Assessment; $691.90 Court Costs; $____ Attorney Recoupment;

$_____ Fine; $_____ Interpreter Costs; $_____ Court Appointed Expert Fees;

_X_ The Department of Corrections shall establish a payment schedule and the Department may immediately issue a Notice of Payroll Deduction.

___ In addition to the above costs the court finds that defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate.

___ Restitution shall be paid at the rate of $_____ per month.

___ Restitution payments shall be completed by _____.

Costs and assessments shall be paid in 180 days after restitution is paid in full. All other fees shall be paid in 270 days after restitution is paid in full.

Defendant shall report within 24 hours of release to the Department of Corrections, 210 No. 2d St. Yakima, WA. Defendant shall pay supervision costs in an amount to be determined by the community corrections officer if defendant has been placed on community supervision. Payments shall be made to the Department of Corrections.

The financial obligations listed herein shall bear interest from the date hereof until paid in full at the rate applicable to civil judgments.

Dated: August 06, 1996 /s/ S.M. Brown
Judge/Judge Pro Tem

APPENDIX H

DARRELL LEE SHAFER NO. 95-1-01068-2
DEFENDANT

COMMUNITY PLACEMENT, RCW 9.94A.120

Community placement is ordered for a community placement eligible offense (e.g., sex offense, serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense), and standard mandatory conditions are ordered. Community Placement is ordered for the period of time provided by law. The defendant shall:

1. report to and be available for contact with the assigned community corrections officer as directed;

2. work at Department of Corrections-approved education, employment and/or community service;

3. not consume controlled substances except pursuant to lawfully issued prescriptions;

4. not unlawfully possess controlled substances while in community custody;

5. pay supervision fees as determined by the Department of Corrections. The residence location and living arrangements are subject to the prior approval of the

Department of Corrections while in community placement.

[ ] Defendant shall not possess or own any firearms.

[x] The defendant shall not consume any alcohol.

[x] Defendant shall have no contact with the victims for the duration of his life.

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to-wit: _____

[ ] The defendant shall participate in the following crime related treatment or counseling services: _____

[x] The defendant shall report for urinalysis and evaluation as ordered by the Department of Corrections. This is to assure compliance with conditions of supervision.

[x] The defendant shall have no contact whatsoever with any minor children for the remainder of his life unless ~~approved~~ ordered by the court, ~~and his community corrections~~ officer.

[x] The defendant will attend and participate in a crime related treatment counseling program if ordered to do so by his community corrections officer.

[x] The defendant shall pay restitution towards victim's counseling.

[x] The defendant shall be available for polygraph examination at the request of the community corrections officer, at client's expense.

[x] The defendant shall not purchase possess, or view any type of pornographic material, to include video tape materials or 1-900 sex lines.

[x] The defendant will complete the sex offender registration requirements within 24 hours after release from incarceration.

APPENDIX I

DEFENDANT: DARRELL LEE SHAFER

CAUSE NO. 95-1-01068-2

IT IS ADJUDGED that the defendant is guilty of the crime(s) of: COUNT #VI-FIRST DEGREE RAPE OF A CHILD COUNT #VII-FIRST DEGREE CHILD MOLESTATION COUNT #VIII-ATTEMPTED FIRST DEGREE CHILD MOLESTATION

APPENDIX M

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DARRELL LEE SHAFER, Petitioner-Appellant, v. MAGGIE MILLER-STOUT, Respondent-Appellee.	No. 03-35254 D.C. No. CV-00-00419-CI Eastern District of Washington, Spokane ORDER (Filed Jun. 14, 2004)

Before: CANBY, WARDLAW, and GOULD, Circuit Judges.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

APPENDIX N

U.S. Constitution: Fifth Amendment

Fifth Amendment – Rights of Persons

Amendment Text | Annotations

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX O

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

Passed by Congress June 13, 1866. Ratified July 9, 1868

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX P

UNITED STATES CODE ANNOTATED

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART VI – PARTICULAR PROCEEDINGS

CHAPTER 153 – HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

[See main volume for text of (a)]

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

[See main volume for text of (c)]

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of

a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence

that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made

* * *

APPENDIX Q

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 03-35254

DARRELL LEE SHAFER,

Petitioner/Appellant,

vs.

MAGGIE MILLER-STOUT,

Respondent/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WASHINGTON

OPENING BRIEF OF APPELLANT, DARRELL LEE SHAFER

---

* * *

STATEMENT OF THE FACTS

In 1996, Appellant SHAFER was convicted by a jury in the Superior Court of Yakima County, State of Washington, in connection with the alleged rape and molestation of three (3) young girls. [ER 1-11]. As a result of that conviction, he received a sentence of three hundred and sixty (360) months imprisonment. [ER 17-23, 25-26]. At Mr. SHAFER's trial, the prosecution relied upon the testimony of two (2) expert witnesses concerning the alleged credibility of the three (3) alleged victims and the alleged truthfulness of those child witnesses concerning the alleged

criminal acts by Appellate. [ER 311-46, 368-423, 531]. One such expert witness was Dr. Roy Simms, a pediatrician. [ER 26, 28, 311-46, 531]. He had conducted a physical examination of one of the complaining witnesses, a nine-year old. [ER 26, 28, 311-46]. While he found no corroborating physical trauma to the girl's body, he nonetheless testified that her statements supported his diagnosis of sexual abuse. [ER 328, 531].

The other expert witness for the State was Robyn Light. [ER 26-27, 368-423, 531]. Ms. Light serves as an investigator with the Yakima County Prosecutor's Office, and manages the victim-witness unit of that office. [ER 26-27, 368-371]. Ms. Light was permitted to testify at trial concerning her opinion that children are incapable of describing events in terms of their senses unless they have actually experienced the events they are describing and, although she had never interviewed any of the complaining witnesses, she had reviewed the children's alleged out-of-court statements to a Yakima County Sheriff's Detective, Edmond West Campbell, and believed that those purported statements contained sensory details consistent with the girls' allegations. [ER 26-32, 368-423, 531].

While the defense vehemently objected to this opinion testimony of Ms. Light, the trial court nevertheless overruled Appellant's objections, thereby allowing her to testify concerning the presence of said "sensory details" in Detective Campbell's reports of his interviews [ER 26-30, 234-35, 377-79, 381, 387, 396-403, 409-13, 532], but instead instructed the jury that the facts relied upon by Ms. Light may or may not be in the record, and those facts should only be considered as the basis for her opinion. [ER 27, 393-94, 396-97, 400-01, 403-04, 410-11, 532]. The jury was also instructed that Ms. Light's opinion testimony was

relevant only to show whether or not each child's interview was consistent with her theories concerning sensory details. [ER 27, 393-4, 396-97, 400-01, 403-04, 410-11]. With respect to these alleged details, Ms. Light related numerous instances of specific sexual conduct and graphic descriptions as set forth in the Detective Campbell's interview statements regarding all three (3) child witnesses. [ER 389, 397-404, 409-16].

Following Ms. Light's testimony, the prosecution called Detective Campbell. [ER 424-71]. In response to the defense objections that the repetition and cumulative effect of the alleged victims' alleged out-of-court statements to the detective would unfairly prejudice Mr. SHAFER, the trial court ruled that the detective could not directly read from his record and notes, which Ms. Light had relied upon, but could summarize for the jury the information contained therein. [ER 27, 407-08, 444]. The State then rested [ER 471], having earlier presented the testimonies of the three (3) complaining witnesses in addition to other alleged witnesses, including a school counselor and the parents of one of the alleged victims. [ER 68-91, 93-146, 146-87, 187-261, 261-72, 272-309, 348-67]. During the prosecution's closing argument, and also on its rebuttal, the State continually and repeatedly emphasized to the jury the great significance of the testimonies of both Dr. Simms and Ms. Light in terms of being compelling evidence of the trustworthiness of the claims made by three (3) complaining witnesses against Appellant SHAFER. [ER 473-92].

Following his conviction, judgment and sentence, Mr. SHAFER filed an appeal with the Washington State Court of Appeals, Division III. [ER 1-2, 7-8, 11-12]. On appeal, the state appellate court evaluated the disputed expert

testimony under Rule 702 of the Washington Rules of Evidence (ER) and concluded that Ms. Light's testimony assisted the jury in understanding the significance of sensory details in the statements purportedly made by the complaining witnesses. [ER 30-32]. In addition, the Washington Court of Appeals concluded that Ms. Light had neither commented directly upon Mr. SHAFER's guilt nor the complaining witnesses' veracity and, accordingly, she had not usurped the exclusive function of the jury to weigh the evidence and determine credibility. [ER 30-31]. As a result, the Washington appellate court upheld the admissibility of Ms. Light's testimony under ER 702. [ER 31-32]. However, the Court did note in its unpublished opinion, entered on June 9, 1998, under appeal no. 1672-6-III, that Ms. Light had, in effect, implied by her opinion testimony that the allegations of sexual abuse of the children were in fact truthful. [ER 30].

The testimony of Dr. Simms was a different matter. [ER 32]. The Washington appellate court held that his testimony in terms of his diagnosis of sexual abuse had been improperly admitted insofar as that diagnosis was based upon nothing more than the statements of the alleged victim who he had examined. [ER 32]. However, notwithstanding this determination of error, the Court of Appeals concluded that such error was harmless beyond a reasonable doubt under the standard set forth in *State v. Florczak*, 76 Wn.App. 55, 75, 882 P.2d 199 (1994), *review denied*, 126 Wn.2d 1010 (1995), given the remaining evidence against Mr. SHAFER which included the testimonies of the three alleged victims, the father and mother [*i.e.*, Lisa Ulrey] of one of the alleged victims, the investigating police detective and the school counselor. [ER 32]. Consequently, after disposing of other issues raised on

appeal, Mr. SHAFER's conviction, judgment and sentence, were upheld by the Washington Court of Appeals. [ER 24-41].

Mr. SHAFER then filed a petition for discretionary review with the Washington State Supreme Court which was later denied on January 5, 1999. [ER 42]. A mandate concerning the case was issued on February 3, 1999. [ER 43].

Mr. SHAFER subsequently filed a personal restraint petition with the Washington State Court of Appeals, Division III, seeking post-conviction relief. That petition was denied on July 27, 2000. [ER 44-55]. Subsequently, on October 27, 2000, the Washington State Supreme Court denied discretionary review of that decision of the state appellate court. [ER 56-60]. A subsequent motion to modify this decision of the state supreme court was also denied on January 9, 2001. [ER 61]. A certificate of finality was then issued by Washington State Court of Appeals, Division III, on July 18, 2001. [ER 62].

A petition for writ of habeas corpus, under the provisions of 28 U.S.C. §2254, was originally filed with the United States District Court, Eastern District of Washington, on November 17, 2000. [ER 1-6]. An amended petition was filed by Appellant on February 15, 2001. [ER 7-10]. A second amended, or superseding, petition was filed with the District Court on June 22, 2001. [ER 11-14]. Said petition for writ of habeas corpus was later denied by order entered by the District Court on February 7, 2003. [ER 530-46].

In distinguishing the present petition from the facts of a similar sexual abuse case, *i.e.*, *Snowden v. Singletary*, 135 F.3d 732 (11th Cir.), *cert. denied*, 525 U.S. 963, 119 S.Ct. 405, 142 L.Ed.2d 329 (1998), the District Court opined that the evidence "against Mr. SHAFER was far stronger

than the case against Mr. Snowden." [ER 535]. In this vein, the District Court referred to the testimony of Lisa Ulrey, Mr. SHAFER's former girlfriend, and the mother of one of the alleged victims, in concluding that any error associated with the testimonies of Dr. Simms and Ms. Light to be harmless by the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). [ER 535]. Ms. Ulrey testified that, on more than one occasion, she was present when Mr. SHAFER had allegedly abused her daughter. [ER 195-204, 535].

In the District Court's view, "the testimony (sic) of Dr. Simms and Ms. Light pale[d] in comparison to Ms. Ulrey's testimony" [ER 535], notwithstanding the fact that Ms. Ulrey was then being held in the Yakima County Jail while awaiting sentencing on two (2) counts of being an accomplice to first degree rape of a child, admitted she was a drug addict, and had also been convicted of other serious crimes in the past. [ER 191-92, 535]. Consequently, the District Court ruled that "even if the admission of both Dr. Simms's (sic) and Ms. Light's testimony was error of constitutional magnitude, it is unlikely that the error had a substantial and injurious effect upon the verdict." [ER 535]. A judgment to this effect was entered by the District Court on February 7, 2003. [ER 546].

Following this decision dismissing Mr. SHAFER's request for habeas corpus relief, the District Court issued a certificate of appealability on March 19, 2003. [ER 549-51]. Said certificate of appealability was confirmed by this Court on June 17, 2003. This appeal follows. [ER 547].

* * *

(2)
Supreme Court, U.S.
FILED
SEP 13 2004
OFFICE OF THE CLERK

No. 04-601

In The

Supreme Court of the United States

DARRELL LEE SHAFER,

Petitioner,

vs.

MAGGIE MILLER-STOUT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DARRELL LEE SCHAFER, Petitioner, v. MAGGIE MILLER-STOUT, Respondent.	No. CS-00-0419-CI REPORT AND RECOMMENDATION TO DISMISS WITH PREJUDICE PETITION FOR HABEAS RELIEF (Filed Dec. 13, 2001)

BEFORE THE COURT on Report and Recommendation is Respondent's Answer and Memorandum of Authorities, which is construed as a Motion to Dismiss under Rule 8, RULES GOVERNING § 2244 CASES. (Ct. Rec. 40.) Also pending before the court is Petitioner's Motion for Appointment of Counsel. (Ct. Rec. 43.) Petitioner, currently imprisoned at the Airway Heights Corrections Center (AHCC), is proceeding pro se; Assistant Attorney General Diana M. Sheythe represents Respondent. The court has reviewed the file and the Motions and is fully informed.

FACTS

The facts were summarized by the Washington State Court of Appeals:

> Darrell Shafer was convicted of five counts of rape of a child, two counts of molestation and one count of attempted molestation. . . .
>
> Early in June 1995, Lisa U. reported to the Yakima police that her boyfriend, Mr. Shafer, had been sexually abusing her daughter, D. During interviews several days later with two

police officers and a Child Protective Services social worker, D described numerous sexual contacts involving Mr. Shafer's hands, mouth, penis and a purple vibrator. She also stated that Mr. Shafer had "touched" her two friends, sisters A and M. Both A and M were then interviewed, and they described an incident when they had spent the night with D at Mr. Shafer's trailer. They claimed he touched them with his hands and the purple vibrator. All these incidents had occurred during the previous year, when D was 9, M was 8, and A was 10.

Mr. Shafer was arrested and charged in late June 1995 with three counts of first degree rape of a child (RCW 9A.44.073) or alternatively, three counts of first degree child molestation (RCW 9A.44.083). This information was amended in August 1995 to seven counts of first degree rape of a child, with seven alternative counts of first degree child molestation, and one independent count of first degree child molestation. A competency hearing was held in October 1995 and the three children were found competent to testify at trial.

After a series of continuances, trial began in January 1996. The court first held a hearing pursuant to RCW 9A.44.120 and *State v. Ryan,* 103 Wn.2d 165, 691 P.2d 197 (1984), to determine whether out-of-court statements by D, A and M could be presented at trial. Noting that all three children were scheduled to testify and that their statements appeared to be reliable, the court ruled the statements admissible. At trial, Randy U. (D's father), Lisa U., the girls' school counselor, the social worker, the two investigating police officers and the three girls testified. Dr. Roy Simms testified that he found no trauma to D's

body, but that her statements supported his diagnosis of sexual abuse.

Additionally, the State presented the testimony of Robyn Light, an expert in interviewing child victims of sexual abuse. Ms. Light testified that skilled interviewers look for "sensory details" to determine whether a sexual abuse allegation should be further investigated. Ms. Light did not interview D, A or M herself, but she examined the statements recorded by Detective Edmond Campbell. (Detective Campbell had not yet testified.) When the State asked Ms. Light if she detected sensory details in Detective Campbell's interviews, defense counsel objected, arguing that this line of questions concerned the credibility of the child witnesses and invaded the province of the jury. The trial court overruled the objection but gave four limiting instructions during this testimony. These instructions cautioned the jury that the facts relied on by Ms. Light may or may not be in the record, and the facts should only be considered as the basis for her opinion. The jury was also instructed that her opinion was relevant only to show whether or not each child's interview was consistent with Ms. Light's theories. Ms. Light related numerous instances of specific sexual conduct and graphic details contained in Detective Campbell's interviews of D, A and M.

Following Ms. Light's testimony, the State called Detective Campbell to the stand. In response to defense objections and concerns that repetition of the victims' out-of-court statements could unfairly prejudice Mr. Shafer, the court ruled that the detective could not read from his record, but must summarize the information. He connected particular sexual acts

with each victim, the time frame and the physical location. The State then rested.

The defense offered only two character witnesses. Following an unsuccessful motion to dismiss, the defense rested. The State then moved to again amend the information, changing Count VIII to attempted first degree child molestation. Over defense objection, the Motion was granted. The jury instructions were crafted to relate each count with a specific victim, time range and address. After deliberations had begun, the jury sent an inquiry to the court noting that two counts were identical and one count did not mention which victim was involved. Counsel from both parties met with the trial court and agreed to withdraw two of the original instructions (Numbers 19 and 23) and substitute three corrected instructions (Numbers 19.1, 23.1 and 23.2). Later, before the verdict was given, defense counsel challenged a juror for contacting a third party and discussing the case. The trial court questioned the juror and decided there was no evidence the juror had been affected by any outside conversations or information. After the guilty verdict, the court polled the jurors and all declared that no juror had injected outside information into the deliberations.

Citing abuse of a position of trust and the operation of the multiple offense policy, RCW 9.94A.390(2), the trial court imposed an exceptional sentence of 360 months.

(Ct. Rec. 38, Ex. 3 at 1-5, footnotes omitted.) Petitioner was convicted of the following charges: five counts, first degree rape of a child; two counts, first degree child

molestation; and one count, attempted first degree child molestation. (Ct. Rec. 38, Ex. 1.)

Following the convictions, Petitioner, through counsel, appealed his convictions; he also filed a *pro se* supplemental brief. (Ct. Rec. 38, Ex. 4, 5.) A Petition for Review by the Washington State Supreme Court was denied. (Ct. Rec. 38, Ex. 8.) Petitioner then sought *pro se* collateral review; the Court of Appeals dismissed his Personal Restraint Petition. (Ct. Rec. 38, Ex. 14.) Discretionary review was denied, as was a Motion to Modify Commissioner's Ruling and Motion to Add New Grounds for Relief. (Ct. Rec. 38, Ex. 16, 17, 19.)

The instant Second Amended Petition (Ct. Rec. 10) for federal habeas review raises the following issues:

(1) Denial of due process by admission of testimony from two witnesses that invaded the province of the jury, specifically:

> (a) the expert opinion of Dr. Roy Simms who vouched for the credibility of the child victim;
>
> (b) the expert testimony by Robyn Light who vouched for the credibility of the victims;

(2) Governmental misconduct and tampering of evidence by Detective Ed Campbell;

(3) Ineffective assistance of counsel, as demonstrated by the following specifics:

> (a) counsel failed to subpoena any of Petitioner's witnesses;
>
> (b) counsel failed to properly investigate the case;

(c) counsel failed to produce crucial, critical evidence in his possession;

(d) defense counsel failed to impeach M with prior inconsistent statements;

(e) defense counsel failed to timely and continuously object to testimony regarding "alleged threats to kill" made by Petitioner to D and her mother;

4. Insufficient evidence or credible corroboration to support the convictions on Counts I, II, III, IV, V, VI, VII, VIII;

5. The Revised Code of Washington, specifically sections 9A.44.073 and 1.08.017, violates the federal Constitution;

6. The admission and repetition of cumulative hearsay from six witnesses deprived Petitioner of a fair jury trial;

7. The admission of testimony referring to alleged threats made by Petitioner to kill was unduly prejudicial and denied Petitioner a fair trial;

8. Newly discovered evidence warrants the vacation of the convictions and a remand for a new trial based on a plea of guilty by D's father to raping his daughter, proof he was, in fact, guilty of the allegations for which Petitioner was convicted;

9. Petitioner was denied due process when an exceptional sentence was imposed based on unproven allegations made during the pre-sentence investigation.

Respondent moves to dismiss the Petition, asserting several claims are unexhausted and now procedurally

defaulted while others should be dismissed on the merits as failing to demonstrate a federal Constitutional violation. Respondent admits claims one, three (d), four, six, and seven were exhausted during direct appeal and claims two, three (a), eight and nine during collateral review. Respondent further contends claims three (b), (c), and (e), as well as claim five remain unexhausted because the former were not raised to the Washington Supreme Court in any form and the latter was presented only as a matter of state law.

Subject to a few exceptions not at issue here, a petitioner who is in state custody and wishes to collaterally challenge a state conviction by a petition for writ of habeas corpus must first exhaust state judicial remedies. *See* 28 U.S.C. § 2254(b)(1); *Rose v. Lundy,* 455 U.S. 509, 518 (1982). The exhaustion requirement is based on principles of comity. In the words of the Supreme Court, "[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Picard v. Connor,* 404 U.S. 270, 275 (1971) (quoting *Darr v. Burford,* 339 U.S. 200, 204 (1950)).

A petitioner can satisfy the exhaustion requirement by invoking one complete round of the State's established appellate review process. *O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999); *Johnson v. Zenon,* 88 F.3d 828, 829 (9th Cir. 1996). The state courts have been given a sufficient opportunity to hear an issue when the petitioner has presented the state's highest court with the issue's factual and legal basis. *See Duncan v. Henry,* 513 U.S. 364, 365 (1995) (legal basis); *Correll v. Stewart,* 137 F.3d 1404, 1411-12 (9th Cir. 1997), *cert. denied,* 525 U.S. 984 and 525

U.S. 996 (1998) (factual basis). A habeas claim must "include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland,* 518 U.S. 152, 162-63 (1996). The Ninth Circuit has held a state prisoner has not "fairly presented" federal claims in state court unless the prisoner has indicated to that court a basis in federal law for those claims. *See Hiivala v. Wood,* 195 F.3d 1098, 1106 (9th Cir. 1999), *cert. denied*, 529 U.S. 1009 (2000). "[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state remedies only if he characterized the claims he raised in state proceedings specifically as federal claims." *Lyons v. Crawford,* 232 F.3d 666, 670 (9th Cir. 2000), *amended on other grounds,* 247 F.3d 904 (2001). To characterize claims specifically as federal claims, "the petitioner must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law." *Id.*

The court has reviewed the briefs submitted to the state courts and agrees with Respondent's conclusions claims three (b), (c) and (e) and five are unexhausted. Claim five was raised in Petitioner's *pro se* Motion for Discretionary Review following the denial of his Personal Restraint Petition; however, although there was mention of a Fourteenth Amendment violation, the development of the argument focused solely on whether RCW 9A.44.073 was the result of an enactment clause in conformity with state law. ("The 'COA' statement at page 12 of the Order Dismissing Personal Restraint Petition, that states '[t]he statutes under which Mr. Shafer was convicted are all part of legislation that contained a title and an enactment clause.' This statement is not true, RCW 9A.44.073 has no enactment clause and this court needs to address this

issue right at this time." (Ct. Rec. 38, Ex. 15 at 14.)) Petitioner's argument is insufficient under the standard announced in *Duncan,* 513 U.S. at 365, to specifically identify a federal constitutional claim. Alternatively, were this court to address the claim on the merits, the undersigned would agree with the state court's ruling "the statutes under which Mr. Shafer was [sic] convicted are all part of legislation that contained a title and enactment clause." *See* Laws of 1988, Ch. 145, §§ 2, 5; Laws of 1990, Ch. 3; Laws of 1994, Ch. 271, § 303.

As for claims three (b), (c) and (e), Petitioner's brief in support of Discretionary Review by the Supreme Court following dismissal of the PRP by the Court of Appeals limits the ineffective assistance of counsel claim to facts involving allegations both the prosecutor and defense counsel interfered in securing the appearance of Petitioner's suggested witnesses in court.[1] Thus, claims three (b), (c) and (e) were not exhausted, are now time-barred by RCW 10.73.090 and, thus, procedurally barred. *See also,* RCW 10.73.140 (prohibition against the filing of successive collateral challenges), and RAP 16.4(d) (no more than one petition for collateral relief will be entertained absent a showing of good cause).

This court may not proceed to the merits of a procedurally defaulted claim unless a prisoner demonstrates "cause" for the default and "actual prejudice" as a result of the alleged violation of federal law, or demonstrates the failure to consider the claim would result in a fundamental

[1] The ineffective assistance of counsel claim involving a failure to impeach M (claim 3(d)) was raised by counsel on direct appeal to both the Court of Appeals and the Supreme Court; thus, that claim is exhausted. (Ct. Rec. 38, Ex. 7 at 19.)

miscarriage of justice. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991); *McCleskey v. Zant,* 499 U.S. 467, 494 (1991). To establish cause for a procedural default, a petitioner must demonstrate some external and objective factor impeded efforts to comply with the state's procedural rule. *See Murray v. Carrier,* 477 U.S. 478, 488 (1986). Such external factors include interference by state officials, unavailability of the factual or legal basis for a claim, or a showing of constitutionally ineffective assistance of counsel. *See id.* No such showing has been made. Accordingly, **IT IS RECOMMENDED** claims three (b), (c), and (e) as well as claim five be **DISMISSED WITH PREJUDICE.**

FEDERAL CLAIMS: STANDARD OF REVIEW

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA), federal habeas corpus relief from a state court judgment will be granted when a petitioner demonstrates the state court's adjudication of the claim on its merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d); in other words, if it applied a legal rule which contradicts a prior United States Supreme Court holding. *Ramdass v. Angelone,* 530 U.S. 156, 165 (2000) (citing *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 1516 (2000)). Relief also is appropriate "if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case." *Id.*

In *Williams,* 120 S. Ct. at 1505-06, the court announced the "clearly established federal law" standard of § 2254(d)(1) is the equivalent of the "old rule" standard under *Teague v. Lane*:

> In *Teague v. Lane,* 489 U.S. 288 (1989), we held that the petitioner was not entitled to federal habeas relief because he was relying on a rule of federal law that had not been announced until after his state conviction became final. The antiretroactivity rule recognized in *Teague*, which prohibits reliance on "new rules," is the functional equivalent of a statutory provision commanding exclusive reliance on "clearly established law." Because there is no reason to believe that Congress intended to require federal courts to ask both whether a rule sought on habeas is "new" under *Teague* – which remains the law – and also whether it is "clearly established" under AEDPA, it seems safe to assume that Congress had congruent concepts in mind. It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.

In *Williams*, the Court observed a rule is "old" or, in other words, a law is clearly established under *Teague*, if it was "dictated by precedent existing at the time the defendant's conviction became final." *Williams,* 120 S. Ct. at 1506 (citing *Teague*, 489 U.S. at 301). In contrast, a rule that "breaks new ground or imposes a new obligation on the States or the Federal Government," is a "new rule," and in this context, would not be a "clearly established" law. *Williams* confirmed the principle that "apart from the Supreme Court, federal habeas courts ought not act as

innovators in the field of criminal procedure, thereby upsetting state convictions because state courts were not prescient and, thus, failed to comply with federal law that did not exist at the time they ruled." *O'Brien v. Dubois,* 145 F.3d 16, 23 (1st Cir. 1998) (citations omitted). Under § 2254(d)(1), the threshold question for a reviewing court is whether the rule of law a petitioner seeks to apply "was clearly established at the time his state-court conviction became final." *Williams,* 120 S. Ct. at 1511. If the rule of law was clearly established, then the court next determines whether the state court's decision was either "contrary to or involved an unreasonable application of" that rule of law. *Id.* at 1512; *see also Baker v. City of Blaine,* 221 F.3d 1108, 1110 n.2 (9th Cir. 2000) (addressing unreasonable application prong).

The role of circuit law in the federal habeas review process is limited. A federal district court may use similar cases from the Ninth Circuit and other circuits to help determine whether Supreme Court law on a particular subject is "clearly established" and whether a state court decision is within the scope of "reasonable" applications of Supreme Court law, but a federal district court cannot overturn a state court decision on habeas review because of a conflict with Ninth Circuit law. *Van Tran v. Lindsey,* 212 F.3d 1143, 1154 (9th Cir.), *cert. denied,* 531 U.S. 944 (2000), citing *Duhaime v. Ducharme,* 200 F.3d 597 (9th Cir. 1999).

VOUCHING OF PROSECUTION WITNESSES

Petitioner asserts the testimony of expert witnesses Dr. Roy Simms and Robyn Light, a sexual abuse interview expert, unconstitutionally vouched for the credibility of the

child victims. Although errors involving the admission of evidence generally constitute matters of state law and do not reach federal constitutional magnitude, if the admission of the evidence violated due process by rendering the trial fundamentally unfair, then habeas relief is available. *See United* States *v. Young,* 470 U.S. 1, 18-19 (1985) (holding it is unconstitutional for the prosecution to vouch for the truthfulness of a witness); *Lambright v. Stewart,* 220 F.3d 1022, 1029 (9th Cir. 2000). When the court finds the admission of the evidence violated due process, the court must then determine whether the error was sufficiently prejudicial as to warrant habeas relief. *See Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993).

The Court of Appeals addressed this issue on the merits:

> Dr. Roy Simms testified that he found no trauma to D's body, but that her statements supported his diagnosis of sexual abuse.
>
> Additionally, the State presented the testimony of Robyn Light, an expert in interviewing child victims of sexual abuse. Ms. Light testified that skilled interviewers look for "sensory details" to determine whether a sexual abuse allegation should be further investigated. Ms. Light did not interview D, A or M herself, but she examined the statements recorded by Detective Edmond Campbell. (Detective Campbell had not yet testified.) When the State asked Ms. Light if she detected or [sic] sensory details in Detective Campbell's interviews, defense counsel objected, arguing that this line of questions concerned the credibility of the child witnesses and invaded the province of the jury. The trial court overruled the objection but gave four limiting

instructions during this testimony. These instructions cautioned the jury that the facts relief [sic] on by Ms. Light may or may not be in the record, and the facts should only be considered as the basis for her opinion. The jury was also instructed that her opinion was relevant only to show whether or not each child's interview was consistent with Ms. Light's theories. Ms. Light related numerous instances of specific sexual conduct and graphic details contained in Detective Campbell's interviews of D, A and M.

. . . .

Expert testimony is admissible pursuant to ER 702 if (1) the witness is qualified as an expert by experience, training or education; (2) the witness's opinion is based on a theory generally accepted in the scientific community; and (3) the testimony is helpful to the trier of fact. . . . The expert qualifications of Ms. Light and Dr. Simms are not challenged on appeal. . . . Our focus, accordingly, is on the "helpfulness" of the expert opinions.

Generally, expert evidence is helpful if it concerns matters beyond the common knowledge of the layperson and does not mislead the jury. Such evidence is not considered helpful if its prejudicial nature is great. While opinion testimony need not be excluded merely because it encompasses an ultimate issue of fact, no witness may testify as to the guilt of a defendant, whether by direct statement or inference. Neither may an expert usurp the exclusive function of the jury to weigh the evidence and determine credibility.

Ms. Light testified that a skilled interviewer looks to see if a child includes sensory details when describing alleged incidents of sexual abuse. She told the jury children are incapable of describing the sights, sounds, smells and feelings that accompany specific acts unless they have directly experienced those acts. She then recited numerous examples of sensory details gleaned from Detective Campbell's interviews with D and M. In effect, she implied that D's and M's allegations of sexual abuse were truthful because they included multiple sensory details.

At one time, Washington courts might have frowned on such testimony. In *Black [State v.]*, [109 Wn.2d 336, 341, 745 P.2d 12 (1987)], a social worker testified that the alleged victim fit a profile for rape victims. The Supreme Court held that this expert opinion unfairly prejudiced the accused by implying the complainant was telling the truth and indirectly offering an opinion on the accused's guilt. More recently, however trial courts have given greater latitude to expert testimony that tends to corroborate the testimony of child sexual abuse victims. In *Holland [State v.]*, [77 Wn. App. 420, 891 P.2d 49, *review denied*, 127 Wn.2d 1008 (1995)], the appellate court held that because the credibility of the victim had been put in issue, an expert could testify it was not uncommon for a sexual abuse victim to delay reporting. A social worker in *Florczak [State v.]*, 76 Wn. App. 55, 882 P.2d 199 (1994), *review denied*, 126 Wn.2d 1010 (1995)] testified that several symptoms suffered by an alleged victim "could be correlated with a child who has been sexually abused.'" The appellate court held that this observation that the child exhibited behavior typical of a group was not a *conclusion* that the child

had in fact been sexually abused or that the defendant was guilty. Accordingly, the expert's testimony did not invade the jury's province to weight [sic] the evidence and make credibility determinations.

When viewed in the light of these recent opinions, Ms. Light's expert opinion may be considered helpful to the jury and not unfairly prejudicial. She testified that interviewers look for sensory details when deciding whether "a sex abuse allegation [is] something that [they] want to continue to investigate." She then recounted all the details she considered "sensory" in the interviews of D and M. Because she did not make a direct comment on the defendant's guilt or the victims' veracity, the jury was left to decide whether the details sufficiently supported the credibility of the victims and whether Mr. Shafer committed the offenses.

Dr. Simms, on the other hand, presented an inadmissible diagnosis of sexual abuse. He offered no scientific basis for his opinion: the physical examination provided no evidence of abuse (although it did not rule out abuse) and his diagnosis was based entirely on the medical history he obtained from D. A doctor's diagnosis of sexual abuse is inadmissible if based only on the statements of an alleged victim. In light of the overwhelming untainted evidence provided by D, M, A, D's father and mother, Ms. Light, Detective Campbell and the school counselor, however, we find that Dr. Simms's erroneously admitted diagnosis was harmless.

(Selected citations and footnotes omitted; Ct. Rec. 38, Ex. 3 at 3, 6-9.)

The question, under the standard of the AEDPA, is whether the state court's analysis was contrary to or an unreasonable application of established law as determined by the Supreme Court law. Even if such constitutional trial error is established, the court must then determine whether the error had a substantial and injurious effect or influence in determining the jury's verdict. *See Penry v. Johnson,* 532 U.S. 782, ___ (2001), citing *Brecht,* 507 U.S. at 637, and *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)). This standard reflects the "presumption of finality and legality" which attaches to a conviction at the conclusion of direct review. *Brecht,* at 633. It protects the State's sovereign interest in punishing offenders and its "good-faith attempts to honor constitutional rights," *Brecht,* at 635, while ensuring the extraordinary remedy of habeas corpus is available to those "'whom society has grievously wronged,'" *Brecht,* at 634 *(quoting Fay v. Noia,* 372 U.S. 391, 440-441 (1963)).

In his legal memorandum, Petitioner has not argued the state court's decision violated Supreme Court law; rather he confines his legal analysis to cases from various circuit courts. He cites *Snowden v. Singletary,* 135 F.3d 732 (11th Cir. 1998), *cert. denied,* 525 U.S. 963 (1998), which held in a habeas proceeding that an expert on child abuse who testified that 99.5% of children tell the truth regarding sexual encounters and that he had never personally encountered an instance where a child had invented a lie about abuse, violated fundamental fairness necessitating habeas relief. *Snowden,* at 737. Even were this court to find the opinion persuasive as to Petitioner's

claim,[2] the state court's decision here was not a violation of Supreme Court law as required by the AEDPA, but rather, at most, a violation of 11th circuit law.

The court has reviewed Ms. Light's testimony and finds there was no direct statement regarding the credibility of the child victims; rather, there was only testimony as to the sensory details in the statements provided by the child victims to the police. (Ct. Rec. 38, Ex. 25 at 640-652.) Additionally, the court instructed the jury as follows:

> Members of the jury, the court instructs you that this particular witness is an expert witnesses [sic] and is here to offer an opinion as compared to being a fact witness and person who observed anything and has first hand knowledge about it. In this kind of case it is permitted that an expert offer an opinion based upon her qualifications, training and education. However, this is not the same thing as saying that this person is here to tell you that a person did something, or did not do something, or the person is more likely or not more likely to have done a specific thing. We are talking about consistencies and inconsistencies only at this time. And whether or not it is inconsistent or consistent that there is a delay in the reporting by a child, or children in this case, or whether or not here is a recantation or not a recantation as you may find in your facts, that's for you to decide. Each of you decides.

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[2] Unlike the facts at bar, there was little evidence other than the expert's testimony supporting the guilt of the defendant. The complaining witness at trial was six years old and the abuse had occurred some two years prior.

> It's permissible for this witness to express an opinion as to whether certain things are consistent or inconsistent with th generally-accepted theories in her field. But she cannot state and will not state to you any conclusions that a person did or didn't do something. The only reason you are to consider this evidence is whether or not it makes it more probably true than not true that something is consistent or inconsistent. That is the only purpose of offering this testimony at this time.

(Ct. Rec. 38, Ex. 25 at 636-37.) The court reiterated the substance of this instruction later during Ms. Knight's testimony (Ct. Rec. 38, Ex. 25 at 640) and then gave the following cautionary instruction:

> Members of the jury, and I'm going to instruct you to follow this instruction. This witness is now relating to the jury certain things upon which she bases her opinion. She's referred to this from time to time as different events that she's observed by reviewing the record. Whether you refer to these as facts or the basis for an opinion, you are instructed that these facts upon which she bases her opinion are permitted here only for the purpose of showing to you what the underlying basis is of her opinion, and not for the truth of those matters that are being related. So if she says, for example, someone said the sky was falling, which is not anywhere in our record, she uses that basis for her opinion. It isn't for the purpose of showing the sky actually fell. It's for the purpose of explaining her opinion.
>
> And I am purposefully avoiding repeating any part of any testimony to avoid any comment by me about whether or not it is or isn't a fact,

> which all of these matters are for you to decide ultimately. That's your job as the fact finder. This person may assume facts and state them as the basis for her opinion, but it's your job to determine the ultimate facts in this case. It is not the job of this witness to state ultimate facts, nor her personal beliefs. But again relate this to the earlier cautionary instruction whether what you have observed in this court is either consistent or inconsistent with some of the issues you have to decision [sic].

(Ct. Rec. 38, Ex. 25 at 643-644.) Finally, at the end of Ms. Knight's testimony on direct, the court instructed the jury for a third time:

> This part of the trial, this particular witness is relating things that are claimed by her to be part of the record. Whether something is or isn't part of the record of these proceedings is for you to decide. She relates these as facts she's observed by her study of a record. It may or may not be the same record that was produced in this court. The facts then that she is relating are not being submitted to you today as proof of such facts, only for the purpose of showing the basis for her opinion.

(Ct. Rec. 38, Ex. 25 at 646-647.) The court concludes the substance of Ms. Knight's testimony was confined to an analysis of the child's statements in light of the scientific theory that the statements of sexual abuse were supported by sensory, emotional and peripheral facts which would were outside the normal experience of a minor child who had not experienced sexual abuse. This was a scientifically supported theory or tool to enable the jury to judge the credibility of the child witnesses. It was this aspect of her

testimony which was stressed by the state during closing argument. (Ct. Rec. 38, Ex. 27 at 887-888.) Additionally, in instructing the jury as noted above, the court was careful not to repeat the child's statements, but rather instructed the jury in general terms. Any prejudicial error was corrected by the instructions which reminded the jurors they were the ultimate fact finders. *See Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1089 (2001).

As for Dr. Simm's testimony, the state court concluded, although error, it was not prejudicial in light of the other evidence of record. As noted previously, even assuming without deciding the error was of constitutional magnitude, this court would have to conclude the error had a substantial and injurious effect or influence in determining the jury's verdict. *See Penry*, 532 U.S. at (2001), citing *Brecht*, 507 U.S. at 637, and *Kotteakos*, 328 U.S. at 776. Dr. Simms testified the child did not name Petitioner as her assailant; thus, there was no evidence from Dr. Simms implicating Petitioner as the guilty party. (Ct. Rec. 38, Ex. 25 at 574.) In light of the trial court's instructions to the jury, the court concludes no such effect has been demonstrated within the meaning of the habeas statute. Accordingly, **IT IS RECOMMENDED** claim one be **DISMISSED WITH PREJUDICE.**

INTIMIDATION OF DEFENSE WITNESSES

Petitioner asserts the his due process rights under the Fourteenth Amendment and Sixth Amendment right to compulsory process were violated when Detective Ed Campbell contacted defense witnesses and advised them it

would not be necessary for them to appear in court and testify. In addressing this claim, the state court noted:

> Mr. Shafer's next alleged ground for a new trial was claimed witness tampering by the deputy prosecutor and a police detective. In denying the motion, the court ruled Mr. Shafer had produced no proof of such conduct. Now, in his petition and support documents, Mr. Shafer also fails to provide competent proof of this claim beyond mere conclusory or hearsay allegations.

(Ct. Rec. 38, Ex. 14 at 8.) A factual finding by a state court is presumed correct unless the presumption is rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner has submitted multiple affidavits in support of this claim, which would raise an inference Petitioner now is attempting to support his claim with specific facts. (Ct. Rec. 11, Exs. B, C, D, E, E.1.)

Under 28 U.S.C. § 2254(2), if the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless (i) the applicant shows the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court or (ii) the factual predicate could not have been previously discovered through the exercise of due diligence. There is no argument by Petitioner that there is a relevant new Supreme Court rule made retroactive to pending habeas cases; accordingly, Petitioner is not entitled to an evidentiary hearing under the first prong. Additionally, Petitioner does not provide an evidentiary basis to support a finding by this court that the evidence now offered could not have been found earlier with due diligence. Finally, the court notes two character witnesses

testified on Petitioner's behalf. (Ct. Rec. 38, Ex. 25 at 715-724; Ex. 26 at 778-808.). Petitioner is not entitled to an evidentiary hearing on the affidavits presented in this Petition. **IT IS RECOMMENDED** claim two be **DISMISSED WITH PREJUDICE**.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner asserts he was denied effective assistance of counsel when counsel failed to subpoena any of Petitioner's witnesses and failed to impeach M, a child witness, with prior inconsistent statements. In addressing these assertions, the Court of Appeals stated the following:

> Mr. Shafer does not specify how he was prejudiced by counsel's decisions not to pursue the witnesses. He provides no competent evidence to indicate how any particular witness would have helped his case. His claim therefore fails for lack of evidentiary support. Moreover, a decision to call or not call, or even interview, a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel.

Ct. Rec. 38, Ex. 14 at 3.)

> Mr. Shafer next contends he had ineffective assistance of counsel. During the pretrial competency hearing, M stated that Mr. Shafer did not penetrate her body with his body or the vibrator. At trial, however, she testified on direct that he put the "massager" inside her "private." He contends his trial counsel should have cross-examined M with her prior inconsistent statement, and that the failure to do so requires

> reversal of his conviction for first degree child molestation of M.
>
> . . . .
>
> Here, although Mr. Shafer's trial counsel did not try to impeach M with her prior inconsistent statement, he did not need to. During his cross-examination he asked her if the massager went "all the way inside" her. She said no. He then asked if Mr. Shafer just rubbed it on the outside. She said yes. Finally, he asked if the massager went inside her anus. Again, she said no. Clearly he did not need to mention her prior inconsistent testimony because he was able to elicit the answers he wanted anyway. Further even if he had failed to impeach her statement on direct that the vibrator entered her private, the error evidently was not prejudicial. He was, after all, convicted only of child molestation, which does not require the element of penetration.

(Ct. Rec. 38, Ex. 3 at 13-14.)

Because this claim was adjudicated on the merits in the state court, a writ of habeas corpus cannot be granted unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . . or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d). The state court relied on the test for ineffective assistance of counsel enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). (Ct. Rec. 38, Ex. 3 at 14, Ex. 14 at 2.) That test is "clearly established" Supreme Court law, *Terry Williams v. Taylor*, 529 U.S. 362, 390 (2000), and, thus, eliminates

the "contrary to" prong of 28 U.S.C. § 2254(d) as a basis for federal habeas relief. Accordingly, the issue in the instant case is whether the state court decision involved an "unreasonable application" of *Strickland*. *See Williams*, 529 U.S. at 410.

An "unreasonable application" occurs if the state court identifies the correct governing legal rule, but unreasonably applies it to the facts of the particular state prisoner's case or correctly identifies the governing legal rule, but either unreasonably extends the principle to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams*, 529 U.S. at 406. The "unreasonable application" is determined, not by reference to a "reasonable jurist" standard, but by analyzing the question of whether the application was "objectively unreasonable" (as opposed to an incorrect or erroneous application). *Williams*, 529 U.S. at 410. Claims of ineffective assistance of counsel are mixed questions of law and fact. *See Crotts v. Smith*, 73 F.3d 861, 864 (9th Cir. 1996), superseded by statute as stated in *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir.), cert. *denied*, 531 U.S. 944 (2000). Here, there is no dispute as to the facts; thus, the only issue is a legal one.

Petitioner contends counsel's performance fell below the accepted professional standard when he failed to subpoena witnesses suggested by Petitioner and failed to impeach M by revealing prior inconsistent statements.[3]

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[3] Petitioner now asserts certain alibi evidence, contending he was not at the location where and when the crimes allegedly occurred. The court has reviewed his submission to the state court and finds no assertion of alibi; thus, to the extent such a claim is raised, it is

(Continued on following page)

The state court concluded no evidentiary basis demonstrated prejudice regarding the failure to hear the testimony of defense witnesses; this conclusion is not contrary to federal law. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994), *cert. denied*, 513 U.S. 935 (1994) (counsel not ineffective when a petitioner states conclusory allegations unsupported by specific facts).

Under 28 U.S.C. § 2254(2), if the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless (i) the applicant shows the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, or (ii) the factual predicate could not have been previously discovered through the exercise of due diligence. There is no argument by Petitioner that there is a relevant new Supreme Court rule made retroactive to pending habeas cases; accordingly, Petitioner is not entitled to an evidentiary hearing under the first prong. Additionally, Petitioner does not provide an evidentiary basis to support a finding by this court that the evidence now offered could not have been found with due diligence. Finally, the state court noted the decision to investigate and call witnesses is an issue of legitimate trial tactics. This conclusion is in conformity with federal law. Mere criticism of a counsel's trial tactic or strategy is not in itself sufficient to support a charge of inadequate representation. *Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980). The state court conclusion was not contrary to nor an unreasonable application of Supreme Court law.

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unexhausted and now procedurally defaulted. *See Correll*, 137 F.3d at 1411-12.

As for the allegation defense counsel failed to impeach M, Petitioner must demonstrate counsel's performance was unreasonable under the totality of the circumstances, as well as prejudice under *Strickland's* second prong. Impeachment evidence is considered a matter of trial tactics. *See Gustave*, 627 F.2d at 905. Additionally, prejudice requires a showing there was a reasonable probability the impeachment would have affected the verdict. As noted by the state court, the jury convicted Petitioner of the lesser charge, which did not include the element of penetration. Accordingly, there has been no demonstration the state court decisions dismissing the ineffective assistance of appellate counsel [sic] claim on collateral review were "unreasonable application[s]" of clearly established Supreme Court law. **IT IS RECOMMENDED** claims three (a) and (d) be **DISMISSED WITH PREJUDICE.**

INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS

Petitioner contends there is insufficient evidence to support the convictions because there is no medical evidence of penetration and the victim's testimony was not consistent with oral-genital penetration, as evidenced at RP 519. (Ct. Rec. 38, Ex. 24 at 519.) Additionally, Petitioner contends the state failed to elect which acts constituted the factual basis for the various counts. In addressing this claim, the state court ruled as follows:

> Mr. Shafer next contends the evidence is insufficient to support the guilty verdict on the five charges of rape involving victim D. He argues the evidence does not support the essential element

> of penetration required for each of these convictions.
>
> . . . .
>
> First degree rape of child, the charge in dispute in Counts I, II, IV, V and VI, requires proof of sexual intercourse with a child less than 12-years-old. . . .
>
> We find circumstantial or direct evidence of penetration in the record to support each of the five convictions rape of D. Additionally, each count is specifically limited to a particular time frame and location. D, D's mother, and/or Detective Campbell (testifying as to D's hearsay statements during his interviews) described actual or inferred penetration of D's labia by Mr. Shafer's fingers, penis or vibrator (counts I, II, V and VI). Although D's mother originally testified she shut her eyes whenever Mr. Shafer put his penis to D's vagina, she admitted she heard her daughter struggle and scream and later remembered seeing the vibrator and Mr. Shafer's penis go into her daughter. Detective Campbell testified that D told him Mr. Shafer put his penis in her mouth (count IV). Viewing the evidence and the inferences in the light most favorable to the state we find that sufficient evidence supports the jury's verdict on each count.

(Citations and footnotes omitted; Ct. Rec. 38, Ex. 3 at 10-11.) During collateral review, the Court of Appeals Commissioner addressed a similar claim:

> Corroborative physical evidence is not required in child sex crime cases.
>
> The State's evidence shows that in Yakima County on or between March and May 1995, Mr.

> Shafer rubbed 9-year-old M's vagina with his hands and a purple vibrator. During the same time frame, he grabbed 10-year-old A's hand and tried to force her to touch his penis. (*See* RP 345-50, 394-95, 692-93, 869-71, 980-981). This is sufficient evidence for the jury to find Mr. Shafer guilty of both crimes beyond a reasonable doubt.

(Citations omitted.) (Ct. Rec. 38, Ex. 14 at 4-5.)

When hearing a sufficiency of the evidence claim in habeas, the court must determine whether the evidence, viewed in the light most favorable to the prosecution, would permit any rational trier of fact to conclude that the defendant was guilty beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). "Circumstantial evidence and inferences drawn from [the evidence] may be sufficient to sustain a conviction." *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir.), amended on denial of reh'g, 798 F.2d 1250 (9th Cir. 1986). Personal testimony, even confused and contradictory testimony, can support a conviction. *See United States v. Frederick*, 78 F.3d at 1370, 1374 (9th Cir. 1996). Additionally, recantation of testimony, without more, is not grounds for habeas relief. *Hysler v. Florida*, 315 U.S. 411, 413 (1942) ("[m]ere recantation of testimony" does not justify voiding a conviction on due process grounds).

As noted previously, findings of fact by the state court are presumed correct, unless there is clear and convincing evidence to the contrary. The evidence Petitioner presents is testimony which was before the jury when they deliberated on the charges. It is not the function of this court to re-weigh the evidence or reassess credibility. Accordingly, **IT IS RECOMMENDED** claim four be **DISMISSED WITH PREJUDICE**.

REPETITIVE TESTIMONY

Petitioner contends no fewer than six witnesses testified to the hearsay complaints of D, M and A. Petitioner asserts expert witness Light re-emphasized the statement Detective Campbell took from D, especially in light of the fact the victims testified at trial. Additionally, Petitioner asserts it was a denial of due process to admit testimony describing Petitioner's alleged threats to kill D and Lisa U.

As noted earlier, any violation of an evidentiary rule is a matter of state law and cannot be the basis for federal habeas relief unless the error renders the trial fundamentally unfair. *Young*, 470 U.S. at 18-19; *Lambright*, 220 F.3d at 1029. Additionally, any due process violation involving trial procedure requires an additional analysis to determine prejudice as required under *Brecht*, 507 U.S. at 637. The State court addressed the issue as follows:

> Mr. Shafer does not challenge the admissibility of D's out-of-court statements; he merely contends their repetition was unnecessarily cumulative.
>
> It is true that statements admissible under the child hearsay statute are still subject to analysis under ER 403, which permits exclusion of evidence if its probative value is substantially outweighed by the danger of prejudice caused by needless presentation of cumulative evidence. The trial court here carefully exercised its discretion to avoid cumulative evidence. Early on, it noted its desire to keep repetition at a minimum. After a police officer introduced some of D's hearsay statements, the court told the parties (in camera) it was aware of the concerns regarding needless petition and promised to balance the

> relevance of each statement with its prejudicial effect under ER 403.
>
> The school counselor, the social worker and one of the officers were allowed to repeat statements D made to them. Each of these witnesses provided slightly different information and they were not merely repetitive. Randy U. state only that D told him Mr. Share had been "messing" with her private parts. Because MS. [sic] Light recited almost every sensory detail contained in Detective Campbell's report, the detective's testimony was stringently limited. Concerned that repetition of the details would be unnecessarily prejudicial, the court ordered him to summarize D's statements. Ms. Light's testimony, although loaded with incriminating detail, was not offered for the proof of the statements and did not tie specific acts to particular times and places. All in all, the court's careful exercise of discretion to admit some statements and exclude others was not abused.

(Citation omitted.) (Ct. Rec. 38, Ex. 3 at 12-13.) As for the testimony regarding the threats to kill D and Lisa U., the state court noted the statements "were not hearsay and were admissible under ER 801(d)(2) as admissions of a party opponent." (Ct. Rec. 38, Ex. 3 at 13.)

The record and trial court's analysis shows there were safeguards in place to prevent the unnecessary repetition of statements and testimony. (Ct. Rec. 38, Ex. 25 at 650-651.) This court concludes the state court's decision was not contrary to or an unreasonable application of clearly established Supreme Court law. Accordingly **IT IS RECOMMENDED** claims six and seven be **DISMISSED WITH PREJUDICE.**

NEWLY DISCOVERED EVIDENCE

Petitioner asserts the fact D's father later pleaded guilty to raping D is evidence which would exonerate Petitioner from the convictions at issue here. At the very least, Petitioner contends it would put the credibility of D's father's testimony against Petitioner at his trial at issue since the methods used by the father were similar to those used by Petitioner. Petitioner further claims there was a conspiracy by the state and the press to keep the news of the father's conviction from him. The state court found:

> Mr. Shafer's claim fails because the evidence of Mr. [U]'s alleged abuse was presented at trial and is in that sense cumulative to the trial testimony. And the fact of Mr. [U]'s guilty plea is unlikely to change the result of the trial due to the strength of the evidence against Mr. Shafer on each count.

(Ct. Rec. 38, Ex. 14 at 4.) Additionally, the Washington State Supreme Court Commissioner also found Mr. [U]'s statement on plea of guilty was admissible as a statement against his penal interest, but proved only that D was raped in 1998 by a man other than Petitioner. Even had the abuse begun earlier in 1994 of [sic] 1995, the time frame for the convictions before this court, the statement did not contradict the notion the child could have been molested by more than one man. (Ct. Rec. 38, Ex. 16 at 4.)

In *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (en banc), *cert. denied*, 523 U.S. 1133 (1998), the court held "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Id.* at 476. *See Jeffries v. Blodgett*, 5 F.3d 1180 (9th Cir. 1993), *cert. denied*, 513 U.S. 985 (1994) (announcing that the

existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not grounds for relief on federal habeas corpus); *see also Swan v. Peterson*, 6 F.3d 1373, 1384 (9th Cir. 1993) (holding newly discovered evidence is grounds for habeas corpus relief only when it both bears on the constitutionality of an applicant's conviction and would probably produce an acquittal). Here, the factual basis for U's guilty plea was based on events occurring in 1998, several years after the abuse which provided the factual basis for Petitioner's convictions. Moreover, there is no affirmative evidence of Petitioner's innocence. Mr. U's testimony at Petitioner's trial was limited to a recitation of the facts when D first reported she had been abused by Petitioner. He asked her simply if "Darrell had been messing with her" and then he stated he reported her positive response to the Yakima Police Department. (Ct. Rec. 38, Ex. 24 at 497-504.) He did not state details of the abuse to the jury. The state court's decision was not contrary to or an unreasonable application of clearly established Supreme Court law. Accordingly, **IT IS RECOMMENDED** claim eight be **DISMISSED WITH PREJUDICE.**

EXCEPTIONAL SENTENCE

Petitioner asserts the exceptional sentence imposed was in violation of due process and his rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). He contends the jury should have decided the credibility of the allegations of the presentence report. Petitioner also contends the state court should have considered the series of rapes as one continuous event, rather than separate independent crimes. Petitioner also argues the state court erred in finding he occupied a position of trust with respect to D,

because he did not spend that much time with her, but was out of the state or fishing.

Federal habeas relief does not lie for mere errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); a state's interpretation of state law is binding on federal courts. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Federal courts are not authorized to inquire into state sentencing laws and will not review alleged errors of state sentences. *Miller v. Vasquez*, 868 F.2d 1116, 1119 (9th Cir. 1989), *cert. denied*, 499 U.S. 963 (1991) (whether a petitioner's sentence was properly enhanced is a question of state law and not cognizable in a habeas proceeding). The only review a federal court may conduct of a state sentence concerns whether the sentence was cruel and unusual, racially or ethnically motived or enhanced by indigency. *Makal v. Arizona*, 544 F.2d 1030, 1035 (9th Cir. 1976), *cert. denied*, 430 U.S. 936 (1977). None of those issues has been raised here.

The state court reviewed the factors which resulted in the enhanced sentence and found them to be supported by the record and sufficient to provide a legal basis for an exceptional sentence. The court further determined that, in light of the various sentencing factors, the term of 360 months was within the court's discretion and was not clearly unreasonable. (Ct. Rec. 38, Ex. 14 at 9-11.) The state court's findings and conclusions were not contrary to nor an unreasonable application of clearly established Supreme Court law.

Petitioner also relies on *Apprendi* as a legal basis for constitutional error. *Apprendi*, decided in June 2000, represents a new rule of constitutional law. Under 28

U.S.C. § 2254(2)(A), Petitioner is not entitled to an evidentiary hearing on such a claim unless the new rule has been made retroactive to cases on collateral review by the Supreme Court. The Supreme Court did not address the issue of retroactivity in the *Apprendi* opinion, has not addressed it in later opinions and there is no ruling on that issue from the Ninth Circuit. *See Dillard v. Roe*, 244 F.3d 758, 773 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 238 (2001), comparing *Jones v. Smith*, 231 F.3d 1227, 1238 (9th Cir. 2000) (declining to apply *Apprendi* rule retroactively in habeas proceeding) with *Hoffman v. Arave*, 236 F.3d 523, 543-48 (9th Cir.), *cert. denied*, ___ U.S. ___, 122 S. Ct. 323 (2001) (Pregerson, J., concurring) (urging retroactive application of *Apprendi* to petitioner's constitutional challenge to state statute requiring trial judge, rather than jury, to "determine facts that increase the potential penalty from life imprisonment to death").

In the absence of controlling law, the application of *Apprendi* to Petitioner's collateral proceedings is foreclosed by the non-retroactivity principle pronounced in *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, a new rule of law has no application to collateral proceedings unless it falls within one of two narrow exceptions to the nonretroactivity principle. The first *Teague* exception, which involves placing certain kinds of individual conduct beyond the power of the state to proscribe, is not applicable here, since homicide remains a crime. The second *Teague* exception, applicable here, requires the retroactive application of certain "watershed rules of criminal procedure." *Teague*, 489 U.S. at 312. Retroactive application will occur under this exception if both (1) a failure to adopt the new rule "creates an impermissibly large risk that the innocent will be convicted," and (2) "the procedure at issue

. . . implicate[s] the fundamental fairness of the trial." *Id.* To qualify under this exception, the new rule must do more than systematically enhance the reliability of a criminal proceeding; the rule must be an absolute prerequisite to the trial's fundamental fairness. *See Carriger v. Lewis*, 948 F.2d 588, 598 (9th Cir. 1991). Here, although Justice O'Connor in her dissenting opinion described the rule as one of "watershed" variety *(Apprendi*, 530 U.S. at 524), the courts have been divided on the issue. *See, e.g., Jones*, 231 F.3d at 1238 *(Apprendi* does not fit second exception); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001) (same); *United* States *v. Latney*, 131 F. Supp.2d 31, 33 (D.D.C. 2001) (same, adding "the vast majority of district courts to consider this issue" agree); but see *Jackson v. United* States, 129 F. Supp.2d 1053, 1068 (E.D. Mich. 2001) *(Apprendi* a watershed rule that fits second exception); *United States v. Murphy*, 109 F.Supp.2d, 1059, 1064 (D. Minn. 2000) (same). This court is constrained by Ninth Circuit law. In *Jones*, the court held, at least as applied to the omission of certain elements from the state court information, *Apprendi* is neither implicit in the concept of ordered liberty, nor an absolute prerequisite to a fair trial. *Jones*, 231 F.3d at 1235-38.

Finally, this court concludes that the sentencing factors at issue are simply that – they are not elements of the crime; thus, *Apprendi*, even were it to be determined retroactive, is not applicable. *See McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1986) (quoting *Patterson v. New York*, 432 U.S. 197, 207 (1977)); *Walton v. Arizona*, 497 U.S. 639, 647-48 (1990). Accordingly, Petitioner has not demonstrated the state court violated a clearly established law as determined by the Supreme Court or unreasonably

applied that law. **IT IS RECOMMENDED** claim nine be **DISMISSED WITH PREJUDICE.**

PENDING MOTIONS

In light of this court's recommendation to dismiss the claims in the instant Petition, **IT IS RECOMMENDED** all other pending Motions be **DENIED AS MOOT.**

OBJECTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report within ten (10) days following service with a copy thereof. Such party shall file written objections with the Clerk of the Court and serve objections on all parties, specifically identifying any the portions to which objection is being made, and the basis therefor. Any response to the objection shall be filed within ten (10) days after receipt of the objection. Attention is directed to Fed. R. Civ. P. 6(e), which adds another three (3) days from the date of mailing if service is by mail.

A district judge will make a de novo determination of those portions to which objection is made and may accept, reject, or modify the magistrate judge's determination. The judge need not conduct a new hearing or hear arguments and may consider the magistrate judge's record and make an independent determination thereon. The judge may, but is not required to, accept or consider additional evidence, or may recommit the matter to the magistrate judge with instructions. *United* States *v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), Fed. R. Civ. P. 73; LMR 4, Local Rules for the Eastern District of Washington.

A magistrate judge's recommendation cannot be appealed to a court of appeals; only the district judge's order or judgment can be appealed.

The Clerk of the Court is directed to file this Report and Recommendation and provide copies to Petitioner and counsel for Respondent and the referring district judge.

DATED this 13th day of December, 2001.

/s/ Cynthia Imbrogno
CYNTHIA IMBROGNO
UNITED STATES
MAGISTRATE JUDGE